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Paul N. Cox

ESSAY

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The Institutionalized Wolf: An Analysis of the Unconstitutionality of the Independent Counsel Provisions of the Ethics in Government Act of 1978

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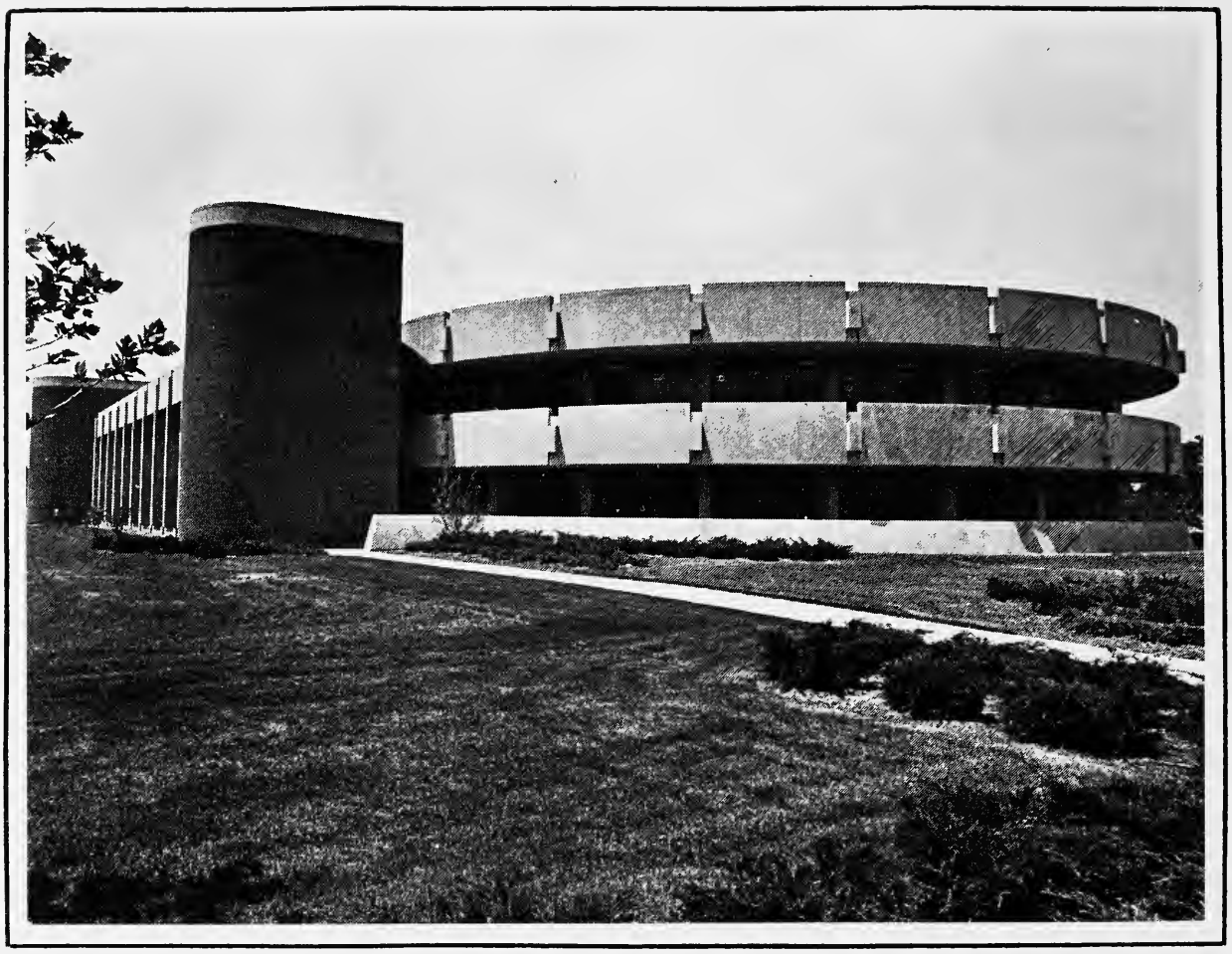

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The Supreme Court, Title VII and "Voluntary" Affirmative Action—A Critique*

Paul N. Cox**

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**Professor of Law, Indiana University, Indianapolis. I thank Joe Tucker and Robin Malloy for a series of conversations in which many of the arguments made here were raised. I am alone responsible both for the opinions expressed and for any error, a responsibility enhanced by the fact that neither agrees with me.

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It is commonplace that the concept of equality is ambiguous.[1] It is commonplace, as well, that Title VII of the Civil Rights Act of 1964 has been judicially interpreted as simultaneously mandating quite distinct understandings of the anti-discrimination principle intimately related to competing and largely incompatible understandings of equality.[2] According to the Supreme Court, Title VII prohibits disparate treatment of individuals on the basis of race or gender in employment,[3] but also prohibits the disparate effect of employment criteria on race and gender groups[4] and permits remedial race and gender preferences benefiting judicially favored groups.[5]

The tension between the individualist model of equality represented by the disparate treatment prohibition and the group rights model of

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[1]*See generally* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107 (1976); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 65 (1975); Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

[2]*See generally* Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531 (1981); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971); Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C.L. REV. 419 (1982); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis*, 59 NEB. L. REV. 345 (1980).

These incompatibilities may roughly be derived from the tension between freedom understood as negative freedom and freedom understood as positive freedom. *See* I. BERLIN, *Two Concepts of Liberty* in FOUR ESSAYS ON LIBERTY 118 (1969). Negative freedom is freedom from interference by others and is associated with individualism or classical liberalism. Positive freedom is the practical ability to achieve self-realization and, therefore, requires not only absence of interference by others but also possession of the means to achieve self-realization. *Compare* Westen, *The Concept of Equal Opportunity*, 95 ETHICS 837 (1985) (advocating a conception of equal opportunity compatible with negative freedom) *with* Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687 (1986) (advocating a conception of equal opportunity compatible with positive freedom).

[3]*See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); McDonald v. Sante Fe Trail Transport Co., 427 U.S. 273 (1976). Although Title VII prohibits discrimination on the basis of religion and national origin, as well as race and gender, the primary lines of doctrinal development have occurred in the latter contexts. This article will discuss only doctrine as applied to race and gender, although much of what is said here is applicable to national origin discrimination as well.

[4]*See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[5]*See, e.g.*, Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); United Steelworkers v. Weber, 443 U.S. 193 (1979).

equality represented by the disparate impact prohibition and by remedial preferences is most obvious in the question of the compatibility of affirmative action with Title VII. The academic commentary examining this tension is voluminous.[6] The initial justification for this further addition to that commentary is that the Supreme Court has recently concluded that race and gender preferences are justifiable under Title VII on the basis of statistical disparities between group representation rates in qualified labor pools and group representation rates in a work force.[7] That conclusion, in combination with the Court's general recent tendency to uphold affirmative action in a variety of contexts,[8] suggests that the group rights conception has triumphed over the individualist conception of equality in employment under Title VII.

There are, however, further justifications for this effort. The tension between competing versions of equality in the jurisprudence of Title VII has left the case law in a state of incoherence. The courts simultaneously seek to enforce both the individualist model and the group rights model.[9] This incoherence is partially attributable to the

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[6]As the tension is evident in both constitutional and statutory analyses, useful commentary exists at both levels. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 135-79 (1980); N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975); R. POSNER, THE ECONOMICS OF JUSTICE 351-407 (1981); Bell, Bakke, *Minority Admissions and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979); Bell, *In Defense of Minority Admissions Programs: A Reply to Professor Graglia*, 119 U. PA. L. REV. 364 (1970); Belton, *supra* note 2; Cox, *The Question of "Voluntary" Racial Employment Quotas and Some Thoughts on Judicial Role*, 23 ARIZ. L. REV. 87 (1981) [hereinafter Cox, *Voluntary Quotas*]; Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Fallon & Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1; Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 TEXAS L. REV. 41 (1986); Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559 (1975); Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); Meltzer, *The* Weber *Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980); Sandalow, *supra* note 1; Strauss, *The Myth of Color Blindness*, 1986 SUP. CT. REV. 99; Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979); Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977); Wright, *Color-Blind Theories and Color-Concious Remedies*, 47 U. CHI. L. REV. 213 (1979).

[7]Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

[8]United States v. Paradise, 107 S. Ct. 1053 (1987); Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). *See* California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 693-94 (1987); *id.* at 695-97 (Stevens, J., concurring).

[9]*See generally* Cox, *Substance and Process in Employment Discrimination Law: One View of the Swamp*, 18 VAL. U. L. REV. 21 (1983).

differing commitments of Supreme Court justices and to shifting majorities on the Court. It is, however, also attributable to dissonance between the Court's rhetoric and the functional realities of its pronouncements. A thesis of this article is, therefore, that the Court has engaged in a sustained effort to adopt a group rights conception as the central theme of its version of Title VII.[10] However, the Court's version of this conception is limited; it compromises incompatible individualist and group rights perspectives. The compromise reflects the tension between individualist and group rights strands of doctrine and, therefore, reinforces the claim that doctrine is incoherent. However, the claim of incoherence requires that the individualist model of the anti-discrimination principle be viewed as incompatible with the group rights model underlying affirmative action. There is, therefore, an additional thesis argued here: justifications of affirmative action cannot be adequately reconciled with pristine forms of the individualist model. Examinations of pristine versions of the individualist model are undertaken both because the language of Title VII and the political rhetoric of the legislative process that enacted it invoke that model and because aspects of individualist thought help to explain fundamental disagreements between advocates of individualist and advocates of group-based versions of the statute.

If the claim that the Court has adopted a group rights conception of Title VII is viable, the claim raises profound questions of the legitimate role of the Court in statutory interpretation. It raises such questions because of the claim made here that Title VII is premised upon the individualist model. If this is the premise of the legislation, the Court's reconstruction of that legislation can be justified only by reference to a theory of statutory interpretation that authorizes an extraordinary degree of judicial discretion to pursue the judicially defined social good. Moreover, such reconstruction would seem explicable, as a descriptive matter, only by reference to such a theory of interpretation. The final theses argued here are, therefore, that the Court's pursuit of group rights is incompatible with Title VII understood from the perspective of traditional conceptions of judicial function in interpreting and applying legislation and is an instance of, and, indeed, can only be understood within the context of, a nontraditional[11] conception of that function.

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[10]*See* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1458 (1987) (Stevens, J., concurring) (before 1978, the Court followed an individualist approach, but has since followed a group approach).

[11]The nontraditional conception may be labeled the "post-legal process school." The legal process school is best represented by H. HART & A. SACKS, THE LEGAL PROCESS:

This Article proceeds as follows: Part I describes the individualist model implicit in the disparate treatment theory of Title VII liability, examines justifications of that theory and attempts to relate the theory to elements of traditional individualist thought. Part II describes the group rights model implicit in Supreme Court doctrine governing disparate impact and systematic disparate treatment theories of liability and governing "voluntary" affirmative action. Part III then attempts to relate these doctrines to two alternative justifications of affirmative action: a straight-forward redistribution of employment rationale and an overenforcement of disparate treatment theory rationale. In particular, Part III examines whether either justification is compatible with the individualist justifications of disparate treatment theory. Finally, Part IV examines Title VII's text, legislative history and arguments favoring affirmative action from traditional and nontraditional perspectives of statutory interpretation.

I. The Individualist Model

A. The Disparate Treatment Prohibition

The individualist model of equality requires that like persons be treated alike. "Likeness" for this purpose precludes consideration of race or gender: persons are alike even if they are of distinct races or genders. The model is captured by the disparate treatment theory of prohibited employment discrimination: an employer may not treat an individual differently than such individual would have been treated "but for" that individual's race or gender.[12] Facial race and gender classifications are therefore prohibited,[13] as well as race or gender motivated employment actions.[14]

It is important to recognize that the disparate treatment prohibition is simultaneously radical in its implications and narrow in its scope and that the prohibition, if applied with discipline, is clearly distinguishable from group-based conceptions of the anti-discrimination principle. The best known illustration of these features of the prohibition

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Basic Problems in the Making and Application of Law (10th ed. 1958). The post-legal process school is best represented by G. Calabresi, A Common Law for the Age of Statutes (1982) and R. Dworkin, A Matter of Principle (1985) [hereinafter Dworkin, Principle]. *See* Cox, Book Review, 1983 Utah L. Rev. 453; Weisberg, *The Calabresian Judicial Artist: Statutes and The New Legal Process*, 35 Stan. L. Rev. 213 (1983).

[12]*See* P. Cox, Employment Discrimination 6-5 to 6-18 (1987).

[13]*See, e.g.*, City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

[14]*See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

is the *Manhart* case.[15] The employment practice there challenged was a rule compelling greater contributions to a pension plan of female employees than of similarly situated male employees. The justification for this disparity in treatment was the accurate generalization that women outlive men. Given that generalization, higher contributions by women were necessary to (1) ensure that pension benefits would be payable to women over their greater life span in periodic amounts equal to benefits payable to men and (2) ensure fairness as between men and women. Disparate treatment was necessary to fairness because absent such treatment, male employees would be forced to subsidize female employees, and the actuarial value of male benefits would be less than the actuarial value of female benefits.

The employer's rule was nevertheless held prohibited because the rule entailed facial disparate treatment on the basis of gender. According to the Supreme Court in *Manhart*, the actual longevity of an individual male or female is not compelled by the average longevity of the gender group to which he or she is classifiable, and fairness as between gender groups does not justify disparate gender treatment of individuals.[16] Notice, then, that the prohibition is of disparate race or gender treatment of individuals and that efficiency, fairness and other values are trumped by it.[17] In particular, notions of fairness of distribution of burdens and benefits are trumped by the prohibition, and the prohibition may be applied even where race and gender are generally accurate proxies for legitimate considerations. Indeed, the prohibition was applied in *Manhart* even though the classification invalidated in that case was not plausibly attributable to prejudice. Nevertheless, the prohibition is also quite limited. An employer is free to use any criteria for an employment decision other than the prohibited criteria.[18] Formal "freedom of contract" is preserved by the prohibition in all respects except that protected status may not be privately used in contracting.[19]

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[15]City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). The case also illustrates the controversy generated by the radicalism of the prohibition. *See, e.g.*, Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980); Kimball, *Reverse Sex Discrimination:* Manhart, 1979 AM. B. FOUND. RES. J. 85; Freed & Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 1981 AM. B. FOUND. RES. J. 585.

[16]435 U.S. at 709. *See* Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983).

[17]The prohibition, if consistently applied, trumps, for example, associational freedom, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); sexual privacy, Rutherglen, *Sexual Equality in Fringe-Benefit Plans*, 65 VA. L. REV. 199 (1979); and efficiency, R. POSNER, *supra* note 6, at 362-63.

[18]*See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[19]The legislative history of Title VII confirms the limited character of the prohibition.

B. Justification of the Disparate Treatment Prohibition

What justifies the disparate treatment prohibition? One possibility, a possibility less suspect than is sometimes imagined, is that race and gender classifications are *a priori* wrong.[20] Another is that they may be founded upon prejudice or hostility and that this hostility is wrong.[21] The difficulty with the hostility possibility is that some classifications, such as that at issue in *Manhart*, do not appear grounded upon prejudice or hostility.[22] A third justification is that race and gender, when used as proxies for other characteristics that are deemed to be legitimate considerations, are inaccurate generalizations in the nature of irre-

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For example, the additional majority views of Congressmen McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias and Bromwell in H.R. REP. No. 914, 88th Cong., 2d Sess., 2150 *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2516 provide:

> It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies membership in unions are strictly filled on the basis of qualification.

The Interpretative Memorandum of Senators Clark and Case on H.R. 7152, the House bill that formed the basis for the Senate compromise bill ultimately enacted as Title VII, states:

> It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.

110 CONG. REC. 7212 (1964). For further statements consistent with these views, see, *e.g.*, 110 CONG. REC. 8921 (1964) (remarks of Sen. Williams); 110 CONG. REC. 2594 (1964) (remarks of Rep. Griffin); 110 CONG. REC. 7215-18 (remarks of Sen. Clark); 110 CONG. REC. 13,088 (remarks of Sen. Humphrey).

[20]*See* A. BICKEL, THE MORALITY OF CONSENT 133 (1975). An *a priori* assumption that race and gender discrimination is "wrong" is not implausible as moral commitment given the tragedy of our experience with such discrimination even if we are unable to articulate the precise features of that morality. One advantage of the *a priori* approach is its simplicity and, therefore, its understandability by the mass of members of the society. Another is that the assumption is compatible with the expressed views of proponents of Title VII in its legislative history. *See infra* note 34.

[21]*See* J. ELY, *supra* note 6, at 153-54.

[22]*See, e.g.*, R. POSNER, *supra* note 6, at 362-63; Strauss, *supra* note 6, at 108-13; Wasserstrom, *supra* note 6, at 618.

buttable presumptions.[23] According to this justification, fairness requires individual consideration with direct measurement of the underlying characteristics. The difficulties with the irrebuttable presumption analysis are that race and gender are often accurate generalizations and that other often accurate but imperfect generalizations in the nature of irrebuttable presumptions are universally employed without objection in employment and other contexts.[24] This rationale, therefore, fails to provide a reason why race and gender should be treated differently than other proxies.

A fourth justification is that race and gender classifications, even when used as accurate proxies, generate psychological harm: they stigmatize disfavored persons as inferior and thereby deny the humanity of such persons.[25] The difficulty with the stigma argument is less with the probable accuracy of the psychological hypothesis than with its manipulability. For example, it is sometimes said that a benign racial preference favoring minorities does not stigmatize whites as inferior because its purpose is remedial. Aside from the possibility that the preference stigmatizes the favored minority person as inferior, the argument fails to account for the attitude of the disfavored majority person toward the remedial motivation. If the majority person does not accept that remediation is a justification for suspending "merit" criteria otherwise applicable, he is likely to regard the favored minority person both with hostility and as inferior.[26] If the majority person accepts the remediation rationale, he is likely to regard himself as morally inferior.[27] Perhaps the majority person is morally inferior, but, if so, it is difficult then to see why feelings of inferiority are plausible explanations for the disparate treatment prohibition. Moreover, it is difficult to see why feelings of inferiority generated by merit criteria,

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[23]*See* Sugarman v. Dougall, 413 U.S. 634, 646-47 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971).

[24]*See, e.g.*, Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U.L. REV. 815, 825-31, 840-43 (1980); R. POSNER, *supra* note 6, at 362-63; Strauss, *supra* note 6, at 108-13; Wasserstrom, *supra* note 6, at 592-94, 618-19.

[25]Brown v. Board of Education, 347 U.S. 483, 494 (1954). *See* Karst, *supra* note 6, at 6 n.25; Karst & Horowitz, *supra* note 6, at 972.

[26]That is, the majority person is likely to respond by viewing the favored minority person as inferior under alternative merit criteria and may respond with hostility to that person's minority status both because the standard rhetoric of "meritocracy" has been violated and because the moral lesson of color blindness has been exhibited as a sham.

[27]*See* Cox, *Voluntary Quotas*, *supra* note 6, at 149-50. The majority person is likely to feel this way to the extent that the justification for the action is the moral necessity of redressing past injustice. Because race or gender are then used as proxies for the victims of injustice, race and gender become moral claims on employment opportunity.

such as educational credentials, are not also subject to legal solicitude.

It is possible, given this litany of difficulties with alternative explanations of the disparate treatment prohibition, to conclude that the prohibition is unwarranted or, at least, that it is warranted only where one or another of the underlying rationales for it is found to be present.[28] That conclusion, however, is a mistake because it fails to account for underlying individualist values, and for certain tensions within these values that may explain both the prohibition and its breadth.

The two central features of the disparate treatment prohibition described above are: (1) race and gender may not be used as employment criteria in the sense that they may not directly cause an employment decision and (2) the prohibition is quite limited in the sense that any other basis for an employment decision independent of race or gender is unaffected by the prohibition. These features of the disparate treatment prohibition express the values, crucial to individualism,[29] that

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[28]*See* Strauss, *supra* note 6, at 118-30.

[29]The notion that persons are distinct and inviolable and that they are to be distinguished from their attributes is asserted, for example, by I. KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 90-97 (H. Paton trans. 1951) [hereinafter KANT, GROUNDWORK]; and I. KANT, METAPHYSICS OF MORALS IN KANT'S POLITICAL WRITINGS 132-36 (H. Reiss ed. 1970); by R. NOZICK, ANARCHY, STATE AND UTOPIA 30-33 (1975); and by J. RAWLS, A THEORY OF JUSTICE 3-4 (1971). The notion that persons, as distinguished from the attributes of persons, may not be subjected to the valuations of others is implicit in the notion of inviolable distinctness. *See, e.g.*, R. NOZICK, *supra*, at 33. Individualist theorists differ, however, in their positions about the connection between persons and attributes and about the proper social mechanism for valuing attributes. As the disparate treatment prohibition assumes that all attributes other than race or gender are the subjects of private exchange, *see* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), it implicitly takes the position that these attributes, albeit separable from persons, are objects to which persons possessing such attributes are entitled. The implication is therefore a Lockean version of individualism. *See generally* J. LOCKE, THE SECOND TREATISE OF GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT, Ch. VI (3d Oxford ed. 1966); R. NOZICK, *supra*, at 232-75. There are other versions, incompatible with the implications of the Lockean version. *See infra* text accompanying notes 186-203.

The separation of person from attributes and possessions is related to a separation of law and morality. *Compare, e.g.*, Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533 (1987) (distinguishing internal and external freedom in Kant's philosophy and claiming that internal freedom, or morality, is communitarian in Kant, but external freedom, or law, is liberal or individualistic in Kant); and Grey, *Serpents and Doves: A Note on Kantian Legal Theory*, 87 COLUM. L. REV. 580 (1987) (Kantian ethics are separated from amoral Kantian law) *with* Benson, *External Freedom According to Kant*, 87 COLUM L. REV. 559 (1987) (arguing that, although law and morality are distinct in Kant, they are unified by reference to a comprehensive understanding of Kantian "practical reason" and by the priority of the Kantian notion of ideal law to Kantian

persons are radically distinct and may not be subjected to the valuations

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morality).

The positivist version of this separation is generally designed to address a task of identification of that which is law and that which is not, so the debate between positivists and anti-positivists tends to be either over this question of identification or over the questions whether law may be judged by moral criteria or whether judicial discretion is cabined by morality. *Compare* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) *with* Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). However, the separation of law and morality has a more fundamental aspect relevant to the individualist-collectivist debate. For the individualist, law ought to be separate from morality in the sense that law ought to be neutral as between competing conceptions of the good. Morality, given the individualist's moral relativism, is allocated to the realm of the person, and law is allocated to the realm of regulating interpersonal conflicts over desired objects or possessions. For the collectivist, understood as a proponent of the use of the coercive apparatus of the state to achieve the good, law and morality cannot be separated because law is the instrument by which his (absolutist) view of morality is implemented. The positivist's insistence on separation can be related to this more fundamental debate, as where the particular positivist in question employs his position on the question of identification in service of an individualist agenda. *See generally*, J. RAZ, THE MORALITY OF FREEDOM (1986). This relationship, however, is not necessary, as the identification question leaves room for quite utilitarian agendas.

The individualist and collectivist are, of course, caricatures employed here to state extreme positions. Many who would claim to be individualists (or, at least, "liberals") nevertheless permit broad discretion to the state to implement "moral" or utilitarian agendas. *See, e.g.*, DWORKIN, PRINCIPLE, *supra* note 11. The extent to which this permission will be granted appears to turn on certain modifications of the separation principles noted above. In particular, it turns upon a rejection of sharp distinctions between law and morality, R. DWORKIN, TAKING RIGHTS SERIOUSLY 22-45 (1978) [hereinafter DWORKIN, RIGHTS], and upon employing the person-attribute distinction in a way that subjects attributes to the authority of the state. The separation of person and attribute in more radical versions of individualism is not a means of distinguishing between those matters over which individuals have rights against the state and those matters over which they do not, because the task of the state within such versions remains minimal—the state is to enforce bargains, prohibit coercion or fraud and implement a limited scheme of corrective justice. The separation in more contemporary versions of liberalism is, however, a means to make this very distinction. *See infra* text accompanying notes 186-203.

Two further aspects of separation theses should be noted. First, the propositions that person and attribute and law and morality are separable are related to the notion that fact and value are separable, that is, that objective description of fact is possible. So, too, are counterarguments. The critic who claims that person and attribute are in fact inseparable may also claim that fact and value are inseparable. *See, e.g.*, Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1877-87 (1987). This claim has important implications for the problem of statutory interpretation. *See infra* text accompanying notes 340-493. If fact and value are radically inseparable, then law is indeterminate, Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L. J. 201, 216 (1931), and it is implausible that a statutory text can be understood by a judge except in terms of or by reference to his preferences. It is, however, questionable that radical separation of fact and value is a viable description of interpretation. Even if the mechanism of communication through texts is not the texts themselves, but rather, the practices of users of language within a

of others. That is, persons are valuable in the sense that the individual is of ultimate or prior value, but the prior value of the individual precludes valuation in the sense of assessment of desert. Persons should not, for example, be used as mere means to another's ends.[30] This implies that persons are equal in the sense that they are equal before the law or have rights to equal opportunity. Persons are not, however, equal in their possession of the attributes, conferred either by nature or by nurture, that enable them to confer benefits on others.[31] These attributes, conceived as separated from but owned by individuals, may be valued in the marketplace through the consent of the individuals entitled to them, but the persons who own such attributes are not subject to valuation, and they are equal because they are not subject

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community of users, L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G. Anscombe trans. 1970), or the perspective of or governing "paradigms" of a community of readers, S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970), it is not the case either that political ideology defines communities or that persons committed to an ideological position are incapable of "finding" a textual meaning with which they disagree. Cox, *Ruminations on Statutory Interpretation in the Burger Court*, 19 VAL. U. L. REV. 287, 371-94 (1985). *See generally* Solum, *On The Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987).

Second, the above-described separations are also related to the notion of separation of means and ends. For an individualist, this separation takes the form of a preference for rules of process over rules of substantive allocation, so that the state is to regulate the means by which persons interact, but not the private ends for which they act. *See infra* text accompanying notes 50-53. The separation may, however, also be employed as a basis for interpreting actions of the state, so that the state's action is narrowly confined to precise means (as through the constitutional nondelegation doctrine or techniques of statutory interpretation) and is not given a force or application consistent with the broad principle or policy that may be attributed as the end for which such means were legislatively adopted. *See* Fletcher, *Principlist Models in the Analysis of Constitutional and Statutory Texts*, 72 IOWA L. REV. 891 (1987). For the anti-individualist, means and ends are inseparable. For example, process rules are in fact rules of substantive allocation, *see e.g.*, Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); and legislation ought to be interpreted to further underlying purpose or policy. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

[30]*See* KANT, GROUNDWORK, *supra* note 29, at 90-96; I. KANT, THEORY AND PRACTICE IN THE PHILOSOPHY OF KANT 415-21 (C. Friedrich ed. 1949).

[31]*See* F. HAYEK, THE CONSTITUTION OF LIBERTY 85-102 (1960). It is possible to view the notion that it is permissible to value only benefits conferred or conferrable on others as more a justification of capitalism than of individualism and to therefore criticize it as paying insufficient attention to individual entitlements in the Lockean sense. *See* R. NOZICK, *supra* note 29, at 158-59. Nevertheless, the notion is compatible with the concept of individual liberty of choice in the use and transfer of holdings because it denies that an end-state principle of moral desert is a permissible basis for the coerced distribution of holdings.

to valuation.[32] In short, individualism separates persons from the attributes and possessions of persons, treats persons as of ultimate but equal value and permits market valuations of attributes and possessions through consensual private exchange.

In effect, the disparate treatment prohibition assigns race and gender to the realm of the person and removes it from the distinct category of attributes of persons; it precludes valuation of race and gender. This understanding is commonly expressed by the assertion that persons should be judged on the basis of their individual talents, accomplishments and attributes, and not by reference to race or gender.[33] Both the legislative history of the Civil Rights Act[34] and Supreme Court

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[32]F. HAYEK, *supra* note 31, at 95. It should more generally be noted that individualists differ among themselves in their views both of the historical process by which social institutions that maximize individual freedom come about and in their rationales for such freedom. For a Locke or a Nozick, the historical (or, at least, hypothetically historical) explanation is conscious design (as in social contract theory), and the rationales rely upon *a priori* versions of the value of the individual and systematic deduction from this value. For a Hayek, the historical explanation is accident or evolutionary accident, and the rationale is ignorance and incompetence (man is incapable of consciously formulating a moral social/political structure). *See* N. BARRY, HAYEK'S SOCIAL AND ECONOMIC PHILOSOPHY 5-9 (1979).

[33]*See, e.g.*, Reynolds, *Individualism v. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995, 998-1000 (1984); Meltzer, *supra* note 6, at 424. It is, of course, possible to attack this value not merely on the ground that social practice permits use of proxies for merit that are imperfect but on the ground that "merit" itself is problematic. *See* Wasserstrom, *supra* note 6, at 619-21. It is true that the concept of merit is problematic in the sense that there can be and are widely divergent and incompatible views of merit founded upon divergent understandings of the good. Access to resources might be viewed as best given to persons who have demonstrated the least capacity to use them effectively (on the theory that they deserve help or practice) or to persons who have demonstrated the most capacity to use them effectively (on the theory that they should be rewarded or the theory that social wealth requires such an allocation). It is, however, not true that individualism has no position on the matter or that its answer is less viable than its alternatives. Also, it must be kept in mind that the individualist value permeates disparate treatment theory.

[34]"Meritocratic" arguments were repeatedly invoked as the rationale for Title VII by its proponents. *See, e.g.*, 110 CONG. REC. 8921 (1964) (remarks of Sen. Williams) ("The language of [Title VII] simply states that race is not a qualification for employment. Every man must be judged according to his ability."); 110 CONG. REC. 13,088 (1964) (remarks of Sen. Humphrey) ("What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications . . ."). *See also supra* note 19. It is apparent that proponents of the legislation that became Title VII cannot be plausibly described as radical individualists. They are merely post-New Deal liberals and, therefore, necessarily proponents of a modified individualism by which expansive state authority over objects is deemed legitimate. *See infra* text accompanying notes 186-203. The general philosophy of Title VII's proponents was not, however, the form of argument employed in support of the legislation. The form of argument employed was individualist in a quite

pronouncements in cases in which the Court has invoked the disparate treatment theory[35] repeatedly invoke this understanding.

Nevertheless, it should be apparent that this version of individualism is in substantial tension with values typically identified with individualism, particularly that of individual liberty of association. To enforce the disparate treatment prohibition is to preclude race- and gender-based choice and to coerce governmentally approved association.[36] The disparate treatment prohibition therefore suggests a version of individualism not grounded in libertarian logic, but in notions of collectively defined personhood and collectively enforced respect for personhood. In effect, the disparate treatment theory declares race and gender inalienable—employers may not purchase and employees may not sell their race or gender—a result incompatible with at least extreme versions of individualism.[37]

The collectively defined notion of personhood protected by the disparate treatment prohibition is nevertheless compatible with the individualist notion that persons ought to be free to constitute themselves through interaction with the social context in which they find themselves without arbitrary limitation.[38] The difficulty, of course, is that the crucial terms "self" and "arbitrary" are defined by the disparate treatment prohibition in particular and controversial ways. The self permitted to interact is an intact self with a right of control over and alienation of all attributes and possessions other than race or gender[39]

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radical sense, perhaps because proponents of the legislation, whatever their personal preferences, recognized that the individualist argument was the one that had some prospect of passage. *See infra* notes 350-54 and accompanying text.

[35]*See, e.g.*, City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978).

[36]*See, e.g.*, Wechsler, *supra* note 17.

[37]*See* H.R. REP. No. 914, 88th Cong., 2d Sess. 30, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2517.

> Aside from the political and economic considerations, however, we believe in the creation of job equality because it is the right thing to do. We believe in the dignity of man. He is born with certain inalienable rights. *His uniqueness is such that we refuse to treat him as if his rights and well-being are bargainable.* All vestiges of inequality based solely on race must be removed in order to preserve our democratic society to maintain our country's leadership, and to enhance mankind.

Id. at 2517 (emphasis added).

[38] A regime that limits collective intervention into private ordering only to preclude use of "force or fraud" would treat individual preferences, including "tastes for discrimination," as givens. It would not seek to intervene on the grounds that these preferences were "wrong" or "distorted" because such a regime is profoundly skeptical about collective competence to define "wrong" and "distorted."

[39]*See* Texas Dep't Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978).

and a limitation is arbitrary only if it requires reference to race or gender.[40] It is possible both to more narrowly define the self and more broadly define that which is arbitrary.[41] Nevertheless, the definitions implicit in the disparate treatment prohibition may be derived from two elements of dominant rhetoric in American society: first, individuals are to be treated as distinct for reasons of their distinctiveness (individual "merit," understood as the distinctive attributes of persons, is valued)[42] and second, free exchange among individuals is valued as an expression of their sovereignty over their distinctness (private exchange between autonomous individuals is preferred to centralized allocation). Once it is conceded that race and gender are no part of the distinctiveness of the individual, these rhetorical elements are compatible with the disparate treatment prohibition. While it is true that this concession is centrally compelled, neither element of individualist rhetoric could be applied without a collective understanding of the individual, and the particular understanding compelled by the concession maximizes private interaction and minimizes centralized allocation.[43]

Actual social practice may be viewed as incompatible with the notion that persons should be judged on the basis of individual merit. In the first place, "merit" is a controversial notion. For example, whether the selection of an employer's relative as an employee is a selection based upon merit is a question answerable only by reference to one's particular understanding of merit, of several distinct understandings of merit, in social practice.[44] In the second place, group measures of merit are commonplace, even when merit is understood in terms of competence. Intelligence tests, for example, are group

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[40]*See* Robbins v. White-Wilson Medical Clinic, Inc., 660 F.2d 1064 (5th Cir. 1981) (Smith, J., dissenting), *vacated*, 456 U.S. 969 (1982); Riley v. Univ. of Lowell, 651 F.2d 822, 824 (1st Cir. 1981), *cert. denied*, 454 U.S. 1125 (1982). *Cf.* Personnel Admin. v. Feeney, 442 U.S. 256 (1979) (disparate treatment at constitutional level of analysis).

[41]*See infra* text accompanying notes 186-203.

[42]"Merit," as the term is used here should be distinguished from the concept of desert. A person's attributes may be valued as meritorious even though he does not deserve them. For example, raw musical talent or athletic ability is meritorious even though the persons having such talents and abilities cannot be said to have earned them except by the accident of birth. *Cf.* F. HAYEK, *supra* note 31, at 94 (using "merit" in the sense of desert). Moreover, the notion that merit is valued does not, in individualist theory, imply that persons are subjected to the valuations of others; persons may not be so treated under that theory. *Id.* Rather, merit understood as attributes apart from but possessed by persons are subject to valuation.

[43]*Cf.* Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253, 254-55 (1980) (collective decisions are necessary and inevitable, but it is possible to distinguish collective decisions that maximize volume and scope of *individual* decisions from collective decisions that maximize volume and scope of *collective* decisions).

[44]*See generally* Fallon, supra note 24.

measures, both over- and under-inclusive in their capacity to predict individual competence for particular jobs.[45]

To say that actual social practice is incompatible with "meritocratic" individualism assumes, however, an authoritative criterion by which "merit" may be identified. The individualist argument is less that merit should be valued than that individuals should be free to transact on the basis of their individual, and perhaps idiosyncratic, versions of merit. In particular, the argument is that "merit" should not be centrally assessed. Race and gender criteria, again, are exceptions to the argument, as the disparate treatment prohibition renders them authoritatively non-meritorious.

A justification for the exception is that historical governmental practice with respect to race and gender has in fact been inconsistent with the individualist argument: race and gender were valued by government and this valuation influenced private practices by, for example, fostering prejudice. On this account, the disparate treatment prohibition serves to undo this influence. Related justifications are those noted above, for example, that race and gender criteria are often used prejudicially and this prejudice is a distortion within the individualist scheme of free exchange. Why, however, should a concededly collective and authoritative decision about the non-meritorious character of race and gender be so broad? That is, if the decision to adopt the disparate treatment prohibition is justified, for example, by a perceived need to preclude prejudice, why should this exception to the individualist scheme of free exchange not be narrowly confined to instances of prejudice?

One justification is a claim from administrative convenience: it is both difficult to distinguish justifiable departures from the value from nonjustifiable ones in the context of race and gender and problematic whether legal decision makers, who are products of that experience, can be trusted to make distinctions.[46] A second justification is pedagogic. It is not surprising that the disparate treatment prohibition focuses upon and renders visible race and gender by singling out only race and gender proxies for prohibition,[47] because a central function of the prohibition is to emphasize repeatedly the moral impermissibility of these particular proxies and the hostility that often underlies their use. It is obvious that this emphasis would be unnecessary, even peculiar, had our historical experience in fact been "color blind,"[48] but that has not been our historical experience. The color blindness slogan is,

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[45]Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[46]*See, e.g.*, R. POSNER, *supra* note 6, at 368-71, 378-86.

[47]Strauss, *supra* note 6, at 108-13.

[48]*Id.*

therefore, not descriptive of the disparate treatment prohibition. It is, rather, evocative, not merely of aspiration, but of moral precept.[49]

A third justification is that the form of the disparate treatment prohibition is compatible with the form favored by individualists: it is relatively general, understandable and predictable. It therefore, minimizes the discretion of adjudicative authorities to pursue substantive agendas independent of that expressed by the prohibition.[50] In the present context, the justification from form is often expressed as the proposition that the disparate treatment prohibition is concerned with a narrow aspect of the *process* of employer decisionmaking, rather than with the *results* reached through that process.[51]

The disparate treatment prohibition is a rule of process in the sense that it is a rule that structures the employment game; players in that game must adhere to the rule but are free to otherwise interact within the game as they wish. They are not compelled to reach particular decisions. In this sense, the prohibition is analogous to classical conceptions of the law of contract. Process rules are inherently over- and under-inclusive because they are general; they do not purport to ensure just allocation of resources or just distribution of wealth, nor to decide questions of desert within the context of particular facts. We are not concerned with the justness of a particular bargain within contract law classically conceived; we are concerned instead, for example, with whether the bargain was induced by fraud, under a narrow definition of fraud.[52] So it is with the disparate treatment prohibition. The prohibition is over- and under-inclusive if viewed as directly addressing the unjustness of prejudice, stigma, and inaccurate or arbitrary employee selection, or if viewed as indirectly allocating employment on the basis of desert. Although it is compatible with these objectives, the prohibition does not have these functions. It functions, instead, as a rule of process and, therefore, as a rule that does not require the degree of governmental intrusion into allocation of employment that would be necessary if these matters were directly addressed. A primary justification of the disparate treatment theory is, therefore, its narrow scope and limited

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[49]The slogan is therefore expressive both of ideal and of means to that ideal. *Cf.* Wasserstrom, *supra* note 6, at 603-15 (recognizing ideals as an element of the analysis, but rejecting color blind theories). Whether it is an effective means is, however, problematic.

[50]*See, e.g.*, F. HAYEK, *supra* note 31, at 148-61. *Cf.* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (describing formalist general rules and critizing same) [hereinafter Kennedy, *Form and Substance*].

[51]*See, e.g.*, Reynolds, *supra* note 33, at 1001.

[52]It is of course possible that contract doctrine is not in fact applied in a fashion consistent with this characterization. *See, e.g.*, Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

content. Within a particular conception of government and a particular conception of the freedom of individuals to interact, the theory has the virtue of precluding governmental allocations founded upon governmental definitions of just distribution of employment.

A problem with this characterization is the difficulty with the claim that classical contract law provided a mere process within which private transactions between autonomous individuals could occur: the process is neither "neutral" nor "prepolitical."[53] The limited character of the disparate treatment prohibition leaves unaltered a distribution of resources that dramatically favors whites and males. These resources, in particular the human capital investment[54] measured and rewarded by merit criteria, are crucial to entry and success within the employment process. A process rule conception of the disparate treatment prohibition is, therefore, not race or gender neutral with respect to the distribution of employment it yields: its result is to disfavor groups lacking human capital resources. To the extent that disparities in the distribution of resources are attributable to the historical practice of disparate treatment and to governmental encouragement and enforcement of that practice, it may be further said that this tendency is attributable to the gov-

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[53]*See, e.g.*, Sunstein, *supra* note 29, at 873, 882, 894-95. It is obvious that the process characterization is an appeal to the classical liberal notion of neutrality, that government should not choose between interests or values because to do so is to abandon the central liberal notion of the relativity of values and to deprive individuals of choice. As such, the appeal is subject to the standard critique, currently espoused most emphatically by adherents of Critical Legal Studies, that government cannot exist if the neutrality value is taken seriously. Government takes sides when it regulates, when it creates rights, and even when it creates rules to facilitate private exchange. *See, e.g.*, Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979) [hereinafter Kennedy, *Blackstone*]. For example, in the present context, the "right" to freedom from race-based decision advanced by the individualist model is simultaneously a denial of a privilege of association. Indeed, it is an imposition of an enforceable obligation regarding association. *Cf.* Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) (implicitly recognizing, as a matter of analytical jurisprudence, the non-neutral character of "rights" by postulating the necessity of a duty given recognition of a right).

A response to the claim of impossibility is to refine the governing understanding of neutrality. *See, e.g.*, RAWLS, *supra* note 29; B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980). Another response is to resort to consensus, or to the generality of the welfare to be maximized under a proposed governmental action, or to alternatives to neutrality (such as equality). The response suggested by the text is to concede the contradiction between neutrality and the governmental enforcement of a right from race or sex based decision, but to nevertheless claim that the violation of the neturality principle implicit in recognition of the right is both limited and consistent with a concededly controversial conception of the individual the neutrality value is supposed to protect.

[54]*See infra* note 136. *See generally* G. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION (1964).

ernmentally provided and privately utilized process of exchange in employment even though the disparate treatment prohibition is now a part of this process.

The systematic tendency of the race and gender neutral process yielded by the disparate treatment prohibition to produce race and gender disparities in distribution of employment may count as a reason for rejecting the prohibition. Certainly it is central to justification of the group rights model to be discussed immediately below. However, the tendency serves better to support the distinction between a focus on process and a focus on the results produced by the process than to defeat this distinction. The complaint that the disparate treatment prohibition produces group disparities is a complaint that it fails to address distribution—that it is, indeed, a mere rule of process.

C. Summary

The disparate treatment prohibition precludes race or gender based employment decisions. However, the prohibition is limited because it requires proof of illicit motivation and a direct causal link between such a motivation and an allocation of employment. Indeed, the prohibition is compatible with an individualistic conception of corrective justice: if A harms B (by using B's race as a criterion for decision with respect to B), A must compensate B. The prohibition is also limited in scope: an employer may utilize any criterion for an employment decision other than race or gender, as such. These features of the disparate treatment prohibition are justified by reference to individualist thought, both as a matter of the political rhetoric of the legislative history of Title VII and as a matter of the judicial rhetoric employed in cases in which the prohibition is applied. Moreover, aspects of individualist philosophy, including separation of person and object, distrust of collective decision, favoring of private exchange in impersonal markets and preference for general rules of process aspects of such a philosophy, are compatible with the prohibition.

II. The Court's Group "Rights" Model

A group rights model of race and gender equality, unlike the individualist model, is concerned with results, not with process. There are distinct group rights models predicated on distinct understandings of what constitutes a group and distinct justifications for recognizing rights in groups. Nevertheless, all of the group rights models are concerned in the present context with a just distribution of employment among race and gender groups. All recognize a group right in the sense that the locus of the claim to just results is in the group; claims of individuals to participate in these results are derived by virtue of

group membership. Distinct versions of the group rights model are outlined at a later point of this article.[55] The present objective is to establish that Supreme Court doctrine, within the rubrics of disparate impact theory, systematic disparate treatment theory and voluntary affirmative action, is characterized by an analytical focus upon substantive distribution of employment among race and gender groups.

There are three potential explanations of this analytical focus. Specifically, it is possible to claim that the Court focuses upon substantive distribution either (1) for purposes of effectively enforcing the individual rights enshrined in disparate treatment theory; (2) for purposes of compensating minorities and women for deficiencies in resources (human capital investment) generated by past societal discrimination and to ensure that competition among individuals will be fair once this "temporary" remedial measure has succeeded in overcoming the legacy of discrimination; or (3) for purposes of ensuring proportional distribution of wealth (that is, of employment and compensation) among race or gender groups.[56] There are clear differences between these purposes. The first purports to enforce disparate treatment theory, the second purports to temporarily suspend it and the third seeks forthrightly to repeal it. Nevertheless, a major theme of the following discussion is that it is not possible to definitively identify which alternative purpose is pursued in practice. In particular, the degree to which one or another of these purposes is functionally achieved is dependent upon the degree and cost of justification of employee qualification requirements.[57] Moreover, judicial rhetoric regarding purpose is an untrustworthy guide to identification. Even where the rhetoric is confined to an enforcement purpose, the costs a court imposes on employers may generate incentives that cause pursuit of equal distribution as an objective.

A. The Disparate Impact and Systematic Disparate Treatment Theories of Title VII Discrimination

Under the Supreme Court's interpretation of Title VII, use of race and gender neutral employment criteria is unlawful if the criteria have a disparate effect on minorities or women and if they are not justified by "business necessity."[58] For example, use of an educational require-

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[55]*See infra* text accompanying notes 166-85.

[56]See P. Cox, *supra* note 12, at 7-1 to 7-3.

[57]*Id.* at 7-36 to 7-48.

[58]Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See* Connecticut v. Teal, 457 U.S. 440 (1982); New York Transit Auth. v. Beazer, 440 U.S. 568 (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

ment, such as a high school diploma requirement, as a prerequisite for a job is unlawful where a substantially greater proportion of the black population than the white population would be excluded from employment by the requirement and where the employer cannot affirmatively establish a "manifest relationship" between possession of the educational credential and acceptable job performance.[59]

There are three possible explanations of the disparate impact theory. The theory might be viewed, particularly if the employer may avoid liability by establishing a facially reasonable relationship between a challenged criterion and job performance, as a proof construct for approximating a disparate treatment theory.[60] Illicit employer motivation is difficult to establish in the litigation process, and it is possible that an employer has used a facially race neutral criterion as a pretext for intentional discrimination, particularly if the disparate effect of use of the criterion was foreseeable. The combination of disparate effect and absence of reasonable relationship raises an inference of illicit motive.[61]

A second explanation of the disparate impact theory is that the policy objective is to eliminate employer use of neutral criteria with disparate effect and, therefore, to implicitly require proportional distribution of employment among race and gender groups. This explanation is particularly persuasive where (1) disparate effect is measured by a comparison of minority or female representation rates within populations or subpopulations and work forces or subsets of work forces;[62] (2) all neutral criteria are subject to the theory, including subjective employer assessments and the entire employee selection process viewed as a single criterion (without regard to its subparts)[63] and (3) it is difficult, expensive or impossible to, in fact, establish business necessity.[64] Although neither the Supreme Court nor the lower federal courts have been consistent in interpreting impact theory, each of these three elements of a proportional distribution explanation of the theory

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[59]*See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607 (1978).

[60]*See* P. Cox, *supra* note 12, at 7-56 to 7-64.

[61]*See* Washington v. Davis, 426 U.S. 229, 253-54 (1976) (Stevens, J., concurring).

[62]*See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). *But see, e.g.*, Connecticut v. Teal, 457 U.S. 440, 454-55 (1982).

[63]*See, e.g.*, Watson v. Fort Worth Bank, 108 S. Ct. 2777 (1988). In *Watson*, the Court held that subjective criteria are subject to the impact theory. No conclusion was reached regarding the question of systems, but four Justices expressed the view that impact theory would not apply to systems.

[64]*See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-35 (1975); Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). *But see, e.g*, New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); Wright v. Olin Corp. 697 F.2d 1172, 1189-92 (4th Cir. 1982). *See generally* Brodin, *Costs, Profits and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318 (1987).

finds support in the case law.[65] If the proportional distribution explanation is correct, the disparate impact theory is the instrument through which a group rights model is implemented.

The final explanation of the disparate impact theory is that it is a remedial means of achieving social and economic conditions necessary to the implicit suppositions of the individualist model. Recall that the individualist model rests on the proposition that an individual's talents and capacities, rather than the individual's race or gender, should determine allocation of employment opportunities. However, the model fails to take into account the historical legacy of racism and sexism: minorities and women must compete as individuals with talents and capacities adversely affected by race- and gender-based distributions of social resources.[66] Arguably, then, a "fair game" of current competition for employment opportunities requires that elimination of employment criteria which "give effect to" past discrimination.[67] Although the Supreme Court has invoked past discrimination as an explanation of disparate impact theory,[68] it has failed to pursue that explanation by undertaking the analysis necessary to it.[69] Specifically, it has failed to identify the characteristics or types of neutral employment criteria likely to give effect to past discrimination. It has likewise failed to respond to the tendency of lower federal courts to ignore the question of characteristics and types.[70]

Both the first and third of these explanations of disparate impact theory may be characterized as compromises. They compromise individualist and group rights models. However, they are compromises of distinct characters. The first, approximation of disparate treatment explanation, is compatible with the individualist model in the sense that it is an attempt to implement the individualist model within the limitations of the litigation process. The third, remedial explanation, is compatible with the individualist model only in the sense that it aspires to the premises of the individualist model. The means by which its aspirations are translated into action, however, is a reliance upon a group right to freedom from barriers to fair game competition. The

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[65]*See* P. Cox, *supra* note 12, ch. 7.

[66]*See, e.g.*, L. Thurow, The Zero Sum Society: Distribution and the Possibilities for Economic Change 184-87 (1980); Friedman, *supra* note 6, at 63-64; Fallon & Weiler, *supra* note 6, at 32-53; Wasserstrom, *supra* note 6, at 584-603.

[67]*See* P. Cox, *supra* note 12, at 7-50 to 7-56.

[68]Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

[69]*See* P. Cox, *supra* note 12, ch. 7. The Court has alluded to the question on occasion, but has never provided sufficient analysis for guidance. *See* Furnco Constr. Co. v. Waters, 438 U.S. 567, 575 n.7 (1978); Nashville Gas Co. v. Satty, 434 U.S. 136, 144-45 (1977). *But see* Watson v. Fort Worth Bank, 108 S. Ct. 2777 (1988).

[70]*See* P. Cox, *supra* note 12, at 7-50 to 7-56; *Watson*, 108 S. Ct. 2777.

dependence of the third explanation upon notions of group rights is exacerbated to the extent that no jurisprudence of barriers has developed. In the absence of such a jurisprudence, the third explanation gravitates to the second—a group right to proportional distribution of employment.

Moreover, both the first and third explanations may gravitate to the second as a functional matter. Particularly where business necessity is made difficult to establish, the employer incentive structure generated by the impact model closely resembles a proportional distribution requirement.[71] As costs of validation of employment criteria with disparate effect rise, employers can be expected to abandon such criteria. The tendency will be to replace such criteria with systems designed to ensure proportionate representation of minorities and women both because quotas are an alternative to abandoned neutral criteria and because of a development within the disparate treatment theory.[72]

Specifically, disparities between a minority group's representation rate in a labor pool and that group's representation rate in an employer's work force are *prima facie* evidence that the employer has engaged in systematic disparate treatment.[73] The primary means by which the inference of illicit motive may be rebutted is proof that there is no such disparity between the labor pool defined by employer selection criteria (the qualified labor pool) and the work force.[74] However, this "rebuttal" of systematic disparate treatment establishes a *prima facie* case of liability under the disparate impact theory.[75] In combination, then, the two theories of liability, if accompanied by a stringent business necessity defense, functionally compel race and gender preferences. Indeed, it is plausible to view systematic disparate treatment theory and disparate impact theory as complementary means of enforcing a single legal command: employers must ensure that they achieve and maintain race and gender balance in their work forces in the sense that their work forces must reflect the race and gender composition

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[71]*See, e.g.*, P. Cox, *supra* note 12, at 7-36 to 7-48.

[72]*See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 463-64 (1982) (Powell, J., dissenting); Albemarle Paper Co. v. Moody, 422 U.S. 405, 451 (1975) (Burger, C. J., dissenting).

[73]Hazelwood School Dist. v. United States, 433 U.S. 299, 309 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 337-40 (1977).

[74]*See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). *See generally* P. Cox, *supra* note 12, at 6-22 to 6-29.

[75]*See, e.g.*, Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 115 (1985); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88 (6th Cir. 1982); Williams v. Colorado Springs School Dist., 641 F.2d 835 (10th Cir. 1981). *But see* Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982).

of qualified labor pools. The impact theory, on this characterization, is merely a device for identifying qualified labor pools.[76]

It is true that this result is merely functional; the rhetoric found in judicial opinions does not suggest that the functional result is purposive. Nor could judicial rhetoric imply such a purpose, given that Title VII expressly declares that race and gender balance is not required by the statute.[77] Nevertheless, it would require extraordinary judicial blindness to fail to recognize that race and gender balance is functionally mandated by the Supreme Court's interpretations of the statute. Concurring and dissenting opinions by a variety of justices have, therefore, recognized this functional mandate.[78]

B. Affirmative Action

1. "Voluntary" Affirmative Action: The Supreme Court Opinions.—"Affirmative action," understood here as the use of race and gender preferences to allocate employment opportunities in favor of minorities and women, typically arises as an issue in two contexts under Title VII: (1) whether, and under what circumstances, a court may order such preferences as a remedy for discrimination,[79] and (2) whether employers are liable for disparate treatment of white males where they "voluntarily" utilize such preferences. The latter context is of primary importance here.

It is immediately apparent that the potential for liability to white males is a direct threat to the functional mandate discussed in the last subsection. If employers are required as a functional matter to ensure race and gender balance, they must necessarily be permitted to engage in disparate treatment on the basis of race or gender.[80] It is also

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[76]Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L. J. 429, 433 (1985).

[77]Civil Rights Act of 1964, (Title VII) § 703(j), 78 Stat. 241 (codified as amended 42 U.S.C. § 2000e-2(j) (1982)).

[78]*See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 463 (1982) (Powell, J., dissenting); United Steelworkers v. Weber, 443 U.S. 193, 209-10 (1979) (Blackmun, J., concurring); Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring).

[79]*See* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Firefighters Local No. 1784 v. Stotts, 467 U.S. 561 (1984). The question has also arisen with respect to the issue of the permissible scope of consent decrees, but is governed in that context by its resolution in the context of voluntary affirmative action. *See* Local No. 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986). A variation on the theme has also arisen in the context of federal pre-emption. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 695-97 (1987) (Stevens, J., concurring).

[80]*See* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 232-34 (1977) (Wisdom, J., dissenting), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

immediately apparent that such disparate treatment is a direct assault upon the individualist model. The extent to which affirmative action threatens the individualist model is, however, a function of the extent to which theories of Title VII liability, particularly disparate impact theory, encourage or compel disparate treatment. Affirmative action is in this sense the mirror image of theories of liability, reflecting the ambiguities of the functional mandates of these theories. Indeed, a central thesis here is that "voluntary" affirmative action cannot be accurately understood in isolation; it is a mere complementary aspect of, indeed the logical implication of, disparate impact and systematic disparate treatment theories of liability. Affirmative action, properly understood, encompasses the entire process by which employers are made to ensure race and gender balance in their work forces.

The Supreme Court initially addressed the issue of "voluntary" affirmative action in *United Steelworkers v. Weber*.[81] The Court concluded that an express quota adopted by an employer and union in collective bargaining requiring that fifty percent of the positions in a craft-worker training program be allocated to black employees did not violate Title VII where a series of conditions were satisfied. These conditions were: (1) the quota was a "remedial" measure designed to overcome the effects of past racial discrimination by craft unions; (2) the quota was "temporary" in that it was designed to overcome racial imbalance rather than to maintain racial balance; and (3) the quota did not "unnecessarily trammel the interests of white employees" in that such employees were neither discharged nor wholly barred from participation in training.[82]

The Court's rationale for this result was in two parts. First, although Title VII expressly prohibits disparate treatment, the statute's purpose was to open employment opportunities for blacks in occupations traditionally closed to them, and the plan effected this purpose.[83] Second, Title VII's anti-quota provision merely states that racial balance is not required; it does not state that "voluntary" quotas are prohibited.[84] The first of these rationales invokes judicially identified statutory purpose and elevates it over statutory language as the touchstone for decision. Moreover, it represents a choice of a relatively abstract congressional purpose, increasing employment opportunities for racial minorities, over a relatively concrete congressional purpose, prohibiting exclusion of racial minorities from such opportunities.[85] The second

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[81]443 U.S. 193 (1979).

[82]*Id.* at 207 n.7.

[83]*Id.* at 203.

[84]*Id.* at 203-04.

[85]*See* Cox, *Voluntary Quotas*, *supra* note 6, at 176.

rationale invokes a peculiar understanding of the term "voluntary." The quota in *Weber* was "voluntary" in the sense that no governmental authority had formally ordered it. It was "involuntary" in the sense that the employer had adopted it as a means of avoiding liability under the functional mandate of disparate impact theory and because a government agency had informally insisted upon it.[86]

Following *Weber*, the Court directly addressed "voluntary" affirmative action in two cases. *Wygant v. Jackson Board of Education*,[87] entailed the constitutionality of a school board decision to provide preferential protection against layoffs to minority employees in derogation of normal seniority rules. *Johnson v. Transportation Agency*,[88] entailed the question of the validity of a gender preference favoring women in hiring under Title VII where the asserted justification for the preference was a disparity between labor pool and work force representation rates.

In *Wygant*, four Justices concluded that historical societal discrimination was not an adequate constitutional justification for a remedial preference: a governmental employer may "remedy" its past acts of discrimination by means of racial preferences, but may not seek to remedy society's discrimination by such means.[89] However, a governmental employer need not make a "finding" of its past discrimination at the time of adoption of a preference, so long as it can produce convincing evidence of such discrimination and of a purpose to remedy it at the time it is challenged.[90] An argument that retaining minority teachers was necessary to provide role models for minority students was rejected by at least three of these Justices.[91] Moreover, these four Justices and a fifth concluded that protection against layoff was not a means sufficiently "narrowly tailored" to a proper remedial purpose to be constitutional because it "unnecessarily trammeled" the seniority expectations of white employees.[92] In contrast to hiring quotas, the impact of a layoff preference is upon identifiable white employees.[93] The dissenting opinions of four Justices would have upheld the plan as a means of preserving affirmative action in hiring for purposes of

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[86]*Id.* at 98-147.

[87]476 U.S. 267 (1986).

[88]107 S. Ct. 1442 (1987).

[89]*Wygant*, 476 U.S. at 274-89 (Burger, C.J., Powell, Rehnquist & O'Conner, J.J.).

[90]*Id.* at 277, 289-91.

[91]*Id.* at 275-76. Justice O'Connor's position on this question is unclear as she both rejected the role model theory and noted that diversity may in some contexts be a legitimate objective of affirmative action. *See id.* at 288 n.*.

[92]*Id.* at 280, 293 (Burger, C.J., Powell, Rehnquist, White, & O'Connor, J.J.).

[93]*Id.* at 283.

overcoming societal discrimination and ensuring educational diversity.[94] Interestingly, three dissenting Justices would have rejected the argument that the quota "unnecessarily trammeled the interests of white employees" because it allocated the burden of furthering these objectives "proportionately between two racial groups"[95] and because white employees had been adequately represented in collective bargaining over the quota.[96]

In *Johnson*, the Court modified, if it did not abandon, the remedial rationale it had employed in *Wygant* and *Weber*. The plan in question provided that "in making promotions within a traditionally segregated job classification in which women have been significantly underrepresented" the employer would consider the sex of qualified applicants as "a factor" in the promotion decision.[97] The plan was adopted because, although 22.4 percent of the employer's employees were women (compared to a 36.4 percent female representation rate in the relevant labor market),[98] the women employees were concentrated in job categories "traditionally held by women."[99] No women occupied positions within the skilled craft-worker category at issue before implementation of the plan.[100] The plaintiff, a male, challenged a promotion decision by which a woman had been promoted within the skilled craft-worker category in preference to the plaintiff. Although the promoted employee and the plaintiff had both satisfied minimum qualifications, the trial court found as a fact that the plaintiff was better qualified and that sex had been the "determining factor" in the promotion decision.[101]

The Supreme Court reaffirmed *Weber* over the dissents of three Justices who would have overruled the "voluntary" affirmative action exception to the disparate treatment prohibition.[102] However, the plan at issue in *Johnson* had features distinct from those of the plan at issue in *Weber* that rendered the former both less and more problematic than the latter. The *Weber* plan included a strict racial quota for a training program for employees not qualified for craft-worker positions.[103] The *Johnson* plan involved the use of gender as a "positive factor" in promotion of employees possessing minimum qualifica-

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[94]*Id.* at 305-06 (Marshall, Brennan & Blackmun, J.J., dissenting); *see also id.* at 314-15 (Stevens, J., dissenting).

[95]*Id.* at 308 (Marshall, Brennan & Blackmun, J.J., dissenting).

[96]*Id.* at 310-11.

[97]Johnson v. Transportation Agency, 107 S. Ct. 1442, 1447 (1987).

[98]*Id.*

[99]*Id.*

[100]*Id.*

[101]*Id.* at 1449.

[102]*Id.* at 1465-76 (Scalia, Rehnquist & White, J.J., dissenting).

[103]United Steelworkers v. Weber, 443 U.S. 193, 199 (1979).

tions.[104] Although race and sex were "but for" causes of the employment decisions at issue in both cases, the preference in *Johnson* was therefore perhaps less blatant than that in *Weber*. However, the plan in *Weber* was justified as a means of remedying "traditional job segregation" in craft-worker positions generated by systematic racial discrimination on the part of craft unions.[105] Although the Court declined to rely on the employer's potential exposure to impact theory liability in *Weber*,[106] it is apparent that the employer's use of an experience requirement in that case "gave effect" to that craft union discrimination by excluding persons who were the victims of that discrimination.[107] The quota in *Weber* thus arguably remedied both third party disparate treatment discrimination and employer disparate impact discrimination. In *Johnson*, no effort was made to trace the gender imbalances "remedied" by the plan in issue to past discrimination on the part either of the employer or of third parties. If the imbalances had been attributable to disparate treatment discrimination on the employer's part, that discrimination was remediable by means of Title VII's prohibition of such discrimination. Absent evidence of disparate treatment, a plausible explanation of the imbalances was self-selection on the part of women: as women have internalized societal role definitions, they have not, in large numbers, sought work "traditionally performed by men."[108]

Despite the Court's insistence that the plan in issue in *Johnson* was a "remedy," it is apparent that the condition remedied was mere gender imbalance in the work force. Although the plurality opinion in *Wygant* required governmental employers to justify preferences in terms of their past discrimination as a constitutional matter, the majority opinion in *Johnson* concluded that representation rate disparities are sufficient as a justification for Title VII purposes[109] and defined the appropriate comparison for this purpose as that between the labor pool qualified under an employer's minimum qualification criteria and the subset of the work force in issue.[110] According to the majority, an employee selection process that failed to require reference to minimum qualifications and mandated selection merely by reference to minority

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[104] *Johnson*, 107 S. Ct. at 1447.

[105] *Weber*, 443 U.S. at 198-99.

[106] *Id.* at 209 n.9.

[107] *Id.* at 209-16 (Blackmun, J., concurring).

[108] *Johnson*, 107 S. Ct. at 1471 (Scalia, J., dissenting). *See* T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 99-108 (1984). It is, of course, possible to define discrimination so as to include self-selection, simply by treating the current imbalance as a reflection of "societal discrimination." This definition, however, establishes the point made in the text: imbalance, as such, is the targeted evil of "voluntary" affirmative action.

[109] *Johnson*, 107 S. Ct. at 1452-53.

[110] *Id.* at 1454.

or female representation rate disparities between the relevant general population and the relevant work force "fairly could be called into question."[111] However, again according to the majority, disparities between qualified populations (defined by an employer's minimum selection criteria) and a work force are a legitimate basis for race and gender preferences.[112]

2. The Relationship Between "Voluntary" Affirmative Action and Group Rights.—The Court's treatment of affirmative action strongly suggests that it has adopted a group rights model for two reasons. First, the Court's tendency to rely upon remedial rationales as justifications for benign preferences is unintelligible except by reference to a group rights model. Second, the Court's understanding of the majority group interests that may not be "unnecessarily trammeled" by affirmative action is a group-based understanding.

a. The Remedial Rationale.—In the context of court-ordered remedies, racial preferences have been justified as remedies for "egregious" discrimination on the part of defendants.[113] Under *Wygant*, governmental employees must justify preferences by reference to their past discriminatory conduct.[114] Even in *Weber*, an employer's "voluntary" affirmative action could be viewed as a "remedy" for the discriminatory practices of craft unions and as a "remedy" for the disparate impact of the employer's selection criteria.[115] From a traditional perspective, however, these remedial rationales were never persuasive.[116] Although they purport to require evidence of past discrimination, they neither require evidence that the persons benefited by affirmative action remedies were indeed victims of such discrimination nor do they require evidence of a nexus between discriminatory practices and injury to individual beneficiaries.[117] The claim that affirmative action is a remedy

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[111]*Id.*

[112]*Id.* at 1455.

[113]*See, e.g.*, Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

[114]Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

[115]*See* United Steelworkers v. Weber, 443 U.S. 193, 209 n.9 (1979).

[116]The traditional notion of remedy is that a wrongdoer is responsible for harm caused by the wrongdoer. Underlying it is a notion of individual responsibility, of individual blameworthiness and of individual freedom from responsibility for both the conduct of other individuals and for the plight of injured persons whose injuries are not causally traceable to the conduct of the wrongdoer. *See, e.g.*, Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 41 (1976); Bush, *Between Two Worlds: The Shift From Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1474 (1986).

[117]*Compare* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC 478 U.S. 421, 447 (1986) (court's authority under Title VII to order affirmative action remedy not

for discrimination invokes the individualist model by implying that preferences are a means of compensating victims of disparate treatment for harm generated by disparate treatment.[118] The absence of a nexus between disparate treatment and injury to the beneficiaries of the remedy belies that implication.

The claim nevertheless might find support in the individualist model if affirmative action is viewed as a means of overcoming a pattern of disparate treatment through forced integration of a work force. Perhaps a form of deterrence, or of restructuring power and information relationships within work forces, is the true remedial rationale, so affirmative action is not retrospective and compensatory, but, rather, prospective.[119] Court-ordered preferences arguably conform to this interpretation.[120] The premise of the interpretation, however, is that the "discrimination" thus remedied is traceable to the individualist model. "Discrimination" for voluntary affirmative action purposes is not traceable to that model; the discrimination "remedied" is "discrimination" only as it is understood within the group rights model. This can be seen by examining *Johnson*,[121] *Wygant*, and *Hazelwood School District v. United States*.[122]

Under Justice O'Connor's concurring opinion in *Johnson*, evidence of a *prima facie* case of disparate treatment liability under *Hazelwood*

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limited to actual victims of discrimination) *with* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 579-80 (1984) (policy of Title VII remedies is to compensate only victims of discrimintion).

[118]*See Sheet Metal Workers*, 478 U.S. at 445 (affirmative action is a remedy for violations of Title VII).

[119]*See id.* at 474. It can be argued, for example, that disparate treatment is partially explicable as a failure of information: as employers lack information about the performance of minorities or women, they decline to hire or promote minorities or women. *See* POSNER ECONOMIC ANALYSIS OF LAW 624 (3d ed. 1986). Forced integration of the workforce overcomes this failure.

It is possible to view any utilitarian justification for liability or legal obligation such as a deterrence justification, as incompatible with individualist premises. *See* Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEG. STUD. 165 (1974); Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). It is true that deterrence policy is directed at group behavior; the goal is to deter a class of behavior engaged in by a class of persons. Nevertheless, such a policy remains compatible with individualist models so long as the occasions for imposition of enforced legal obligation are limited to individual breaches of such obligation and the breach is defined in terms of individual responsibility for individual conduct.

[120]*See Sheet Metal Workers*, 478 U.S. at 474. *But see* United States v. Paradise, 107 S. Ct. 1053 (1987) (affirmative action may be imposed as a remedy for defeated expectations of minorities under an earlier court decree).

[121]Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

[122]433 U.S. 299 (1977).

would suffice as proof of past discrimination for *Wygant* purposes.[123] This understanding of "past discrimination," however, is far less evocative of disparate treatment than of an employer's cost-benefit analysis in contemplating litigation. A *prima facie* case of systematic disparate treatment is made out under *Hazelwood* by proof of a statistically significant disparity between minority representation in a minimally qualified labor pool within a relevant geographical area and an employer's work force or subset thereof.[124] Such a disparity raises an inference of intentional discrimination on the supposition that a work force will, over time, reflect the racial composition of the population from which it is drawn.[125] This supposition is obviously erroneous: as race and gender are correlated both with qualifications not considered in establishing the *prima facie* case and with the employment preferences of potential employees, work forces are not in fact randomly drawn samples from populations even where there is no intentional discrimination.[126]

The inference of intentional discrimination is entertained under *Hazelwood* as a matter of litigation management, not because the inference is a strong one; the *prima facie* case forces the defendant to establish the correlations that rebut the inference.[127] Rebuttal, of course, is expensive and risky; hence, *Hazelwood* generates an incentive to engage in race and gender quotas to ensure a balanced work force. Moreover, successful rebuttal subjects the employer to exposure under the disparate impact theory. Proof of a correlation between employment criteria and race or gender is proof of the disparate effect of such criteria. To treat a *prima facie* case of discrimination under *Hazelwood* as "discrimination" for *Wygant* purposes is therefore to define discrimination in terms of the incentive structure generated by the litigation

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[123]*Johnson*, 107 S. Ct. at 1462-63.

[124]*Hazelwood*, 433 U.S. at 308.

[125]*Id.* at 307.

[126]*See, e.g.*, H. BLALOCK, SOCIAL STATISTICS 140-41 (2d ed. 1972); T. SOWELL, ETHNIC AMERICA 273-96 (1981); Meier, Sacks & Zabell, *What Happened in* Hazelwood*: Statistics, Employment Discrimination, and the 80% Role*, 1984 AM. B. FOUND. RES. J. 139, 154-57; Smith & Abram, *Quantitative Analysis and Proof of Employment Discrimination*, 1981 U. ILL. L. REV. 33, 42.

[127]*See Hazelwood*, 433 U.S. at 308-09. There is of course an inference of illicit motive that arises from such a disparity, and the inference is sufficient to warrant shifting the burden of production to the defendant where the prima facie case has accounted adequately for plausible qualifications, plausible employee recruitment or commuting distances and relevant time frame. *See* P. Cox, *supra* note 12, at 6-22 to 6-29. Nevertheless, there is a significant risk that allocation of the burden of proof will be outcome determinative, because the availability of data from which rebuttal might be constructed may be as problematic for the defendant as for the plaintiff. *Id.* at 18-14 to 18-16.

risks emanating from *Hazelwood*. Under Justice O'Conner's definition, "past employer discrimination" functionally denotes race or gender imbalance in a work force.

The majority opinion in *Johnson* renders this definition explicit by, in effect, conceding that an understanding of past discrimination rooted in the individualist model is not a prerequisite to voluntary affirmative action; imbalance will suffice. Indeed, the majority opinion is explicit in noting that imbalance sufficient for a *prima facie* case under *Hazelwood* is not required.[128] If "voluntary" affirmative action is a "remedy," it is a remedy for imbalance. It is not a "remedy" for past disparate treatment on the part of the employer adopting it nor is it a remedy compensating actual victims of any identified disparate treatment. *Hazelwood*, *Wygant* and *Johnson* therefore imply a definition of "discrimination" quite distinct from the definition underlying the individualist model: "discrimination" is failure to allocate employment proportionately among race and gender groups.

b. White Male Interests.—The second reason for the conclusion that the Court has adopted the group rights model is that the requirement that an affirmative action plan not "unnecessarily trammel" the interests of white males[129] has been defined by the Court in group terms, with the possible exception of individual expectations in seniority principles for discharge or layoff purposes. Justices Marshall, Brennan and Blackmun were quite explicit about this in *Wygant*. According to their dissenting opinion in that case, a racial preference in layoff protection did not unnecessarily trammel white interests because whites as a group retained proportional employment under the preference; an individual white employee's loss of employment because of his race was, on this view, irrelevant.[130] White interests were similarly defined by the majority in *Weber*, a case not entailing discharge or layoff of white workers.[131] A majority of the Justices declined to adopt a group version of white interests in *Wygant*, apparently because individual expectations of continued employment on the part of incumbent employees are assigned a special status by the majority.[132] Nevertheless,

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[128]Johnson v. Transportation Agency, 107 S. Ct. 1442, 1452-53 (1987).

[129]*Id.* at 1451; *see also* United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

[130]Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 295 (1986) (Marshall, J., dissenting).

[131]"Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white." *Weber*, 443 U.S. at 208.

[132]*Wygant*, 476 U.S. at 283 (Powell, J., Burger, C.J. & Rehnquist, J.); *see also id.* at 284 (O'Conner, J., concurring); *id.* at 294 (White, J., concurring). It is significant that the two cases in which the Court struck down affirmative action plans, *Wygant* and Firefighters Local No. 1784 v. Stotts, 467 U.S. 561 (1984), entailed plans that deprived incumbent white employees of employment on the basis of race. The cases in which the

a majority of Justices adopted a group version of white interests in *Johnson*, and did so under circumstances that defeated the promotion expectations of a limited number of identifiable incumbent employees.

According to the Court in *Johnson*, the plan there in issue merely identified sex as one factor among many that would be considered in promotion decisions, and the individual plaintiff had "no legitimate firmly rooted expectation" in the promotion as he had no entitlement to it.[133] Nevertheless, the trial court had found that sex was the determining factor in the promotion decision, and the objective of the preference was gender balance in the work force. The expectation defeated by the preference was, therefore, the expectation rooted in the individualist model: the expectation that gender status would not cause employment decisions with respect to the individual. The individual "white male interests" recognized as legitimate under the Court's rationale are solely vested interests in current positions: individual white males may not be discharged because of their race or gender. With this exception, the expectations recognized under the Court's opinions are group expectations, expectations to proportional race and gender group representation.

c. Limitations on the Court's Group Rights Model.—There is, however, a further aspect of the Court's opinion in *Johnson* that suggests that the Court's group rights model is both incomplete and ambivalent. The Court's focus upon minimum qualifications in *Johnson* appears anomalous if interpreted as a condition to immunize employers from disparate treatment liability to white males, because it is difficult to see why minimum qualifications should be required of a "voluntarily" adopted plan given that the employer is the party most clearly interested in qualifications. Why should a white or male employee, disfavored by a preference not triggered by minimum qualifications, have standing to complain that the employer did not impose such qualifications? However, the minimum qualifications requirement *is* plausible if viewed in relation to the disparate impact theory and systematic disparate treatment theory.

From the employer's perspective, a legally viable qualifications requirement is one that will not generate excessive costs of justification. The more likely the possibilities that a requirement will be challenged

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Court has upheld affirmative action plans, (Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); United States v. Paradise, 107 S. Ct. 1053 (1987); United Steelworkers v. Weber, 443 U.S. 193 (1979); Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987); Local 93 Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986)), all entailed plans that allocated prospective employment opportunities to which white incumbents had no immediate claim.

[133] *Johnson*, 107 S. Ct. at 1455.

and that a heavy burden of justification will be imposed, the less likely it is that these costs will be justified by the benefits obtained in utilizing the requirement.[134] Under the disparate impact theory, a legally viable minimum qualification is one justifiable under the disparate impact model. A viable qualification under that theory is one either sufficiently "necessary" that it will pass muster under the business necessity defense[135] or one that has no substantial adverse effect due to its identification of attributes generally possessed by minorities and women as well as whites and males. Qualifications requirements measure human capital investment.[136] For example, a job experience requirement measures investment in experience. Non-elite forms of human capital investment are devalued under the disparate impact model because qualifications that identify such investments are less likely to pass muster under the business necessity test.[137]

Moreover, a *prima facie* case of discrimination may be made under the systematic disparate treatment theory by taking into account only minimum qualifications.[138] Minimum qualifications requirements are themselves subject to attack under the disparate impact theory.[139] Non-elite forms of human capital investment therefore also tend to be devalued under systematic disparate treatment theory.[140] Given the threat of liability arising from these theories, the minimum qualifications an employer is likely to employ within lower level job categories are those that will ensure a supply of women and minority candidates and

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[134]*See* P. Cox, *supra* note 12, at 7-36 to 7-48.

[135]Arguably, the business necessity defense has been relaxed in recent years. *See, e.g.*, New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). Nevertheless, the disparate impact theory continues to impose significant costs of justification. *See, e.g.*, Gilbert v. City of Little Rock, 799 F.2d 1210 (8th Cir. 1986); Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981).

[136]"Human capital investment" means investment in education, experience and training. In theory, such investment determines supply in the labor market and may be used as a basis for comparing compensation levels (return on investment) on the supposition that measurable forms of investment are good proxies for productivity. *See* A. Rees, The Economics of Work and Pay 33-52 (2d ed. 1979).

[137]*See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982).

[138]*See, e.g.*, Segar v. Smith, 738 F.2d 1249, 1274 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); De Medina v. Reinhardt, 686 F.2d 997, 1003 (D.C. Cir. 1982).

[139]*See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[140]*See* Hazelwood School Dist. v. United States, 433 U.S. 299, (1977) (distinguishing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) on the ground that anyone can drive a truck, but teachers must be certified). For criticism of this tendency, see Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 48-49.

substantial subjective discretion in selecting among candidates. Subjective discretion replaces formal, objective criteria where these criteria are subject to legal attack (under the disparate impact theory) or are ignored (for purposes of a *prima facie* case under the systematic disparate treatment theory).

An employer is more likely to utilize formal minimum qualification for higher level and elite job categories, thus reducing the minority and female representation rate in the qualified population where minorities and women disproportionately lack elite qualifications. Employers are therefore less likely to encounter disparities between workforce and qualified population rates with respect to high-level and elite positions. However, the employer is again faced with making subjective judgments in choosing between qualified candidates once minimum qualifications have been satisfied. Although the judicial tendency is to give greater deference to these subjective judgments where elite positions are at stake,[141] the courts question disparities in group representation rates generated by subjective processes in lower level job categories.[142]

Subjective employee selection processes present a difficulty for employers, as they may produce disparities between white male and minority or female selection rates and these disparities are evidence of unlawful discrimination. This difficulty will be particularly acute for high-level managers who have delegated responsibility for employee selection, because it will be difficult to determine whether such disparities are attributable to disparate treatment or are instead attributable to race and gender neutral criteria informally considered but not accounted for in formal minimum qualification criteria. From the point of view of a complex bureaucratic organization, such as a modern corporation, control of and monitoring of the exercise of discretion in employee selection may require formal and relatively simplistic measurements of the performance of officials exercising such discretion.[143] This suggests the use of objective minimum qualifications criteria as a control and the need for a means to prevent the varieties of minority

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[141]*See generally*, Bartholet, *supra* note 137; Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet*, 77 Nw. U.L. Rev. 776 (1983).

[142]*Compare* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (requiring that plaintiff account for minimum professional qualifications) *with* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (permitting plaintiff to rely upon gross population data for analysis of truck-driving positions).

[143]*See Affirmative Action and Federal Contract Compliance: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 114-18 (1985) (statement of George P. Sape, Vice Pres., Organization Resources Counselors Inc.) (large companies would use numerical goals and timetables as necessary means of management even absent governmental compulsion).

and female underrepresentation that may be used as evidence against the employer.

A solution is to require selection by reference to group representation rates in the qualified populations defined by minimum qualifications criteria. A difficulty with express adoption of such a solution is that it invites disparate treatment claims by white males; it creates a race or gender quota. An affirmative action exception to the disparate treatment theory obviates this difficulty. An affirmative action exception that incorporates a minimum qualifications element both minimizes the threat of white male lawsuits and serves the corporate bureaucracy's interest in controlling the discretion (including the discretion to engage in disparate treatment) of the elements of the bureaucracy engaged in employee selection.[144]

From the point of view of relatively large employers with complex bureaucratic organizations, then, *Johnson*[145] is a godsend. Although *Weber*[146] had recognized an affirmative action exception to the disparate treatment prohibition and had not conditioned the exception on an employer's concession that it had discriminated, *Weber* was subject to the interpretation that affirmative action would be appropriate only where the employer was at risk under the disparate impact theory. The employer in *Weber* had utilized a race-neutral experience requirement that "gave effect to" the disparate treatment of craft unions and therefore perpetuated the "traditionally segregated job categories" the affirmative action plan there in issue sought to address. *Johnson*, however, is not subject to this interpretation, because imbalance, as such, may be addressed by an employer under that opinion. *Johnson* obviates the uncertainties faced by an employer engaged in subjective decision making by providing a ready benchmark, in the form of race and gender balance, for employee selection decisions.

Johnson's minimum qualifications requirement, therefore, appears to have far less to do with the "right" of white male employees to insist upon such qualifications than with the interest of employers in finding a safe harbor from exposure to Title VII liability. It is no coincidence that this safe harbor is compatible with an objective of

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[144]In a sense, then, *Johnson* resurrects a form of the "bottom line" defense rejected in Connecticut v. Teal, 457 U.S. 440 (1982). Although an employer may not claim that bottom line racial balance justifies use of a neutral criterion that could otherwise be impermissable under the disparate impact model, bottom line balance precludes adverse inferences that would arise from representation rate disparities appearing from the use of subjective criteria or from the effect of the selection process viewed as a whole. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978).

[145]Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

[146]United Steelworkers v. Weber, 443 U.S. 193 (1979).

race and gender balance in work forces; the price of the safe harbor is such balance. There is, however, a paradox inherent in this safe harbor. It is that the group right to proportional allocation of employment implicit in it is limited in scope.

The minimum qualifications "required" by *Johnson* are presumably those that would survive attack under the impact theory and would be taken into account for *prima facie* case purposes under the systematic disparate treatment theory; at least, they are the qualifications an employer remains willing to use in the face of threatened liability under these theories. As there is progressively more judicial deference to the human capital investment requirements of employers for progressively higher level jobs (because such requirements in fact do increase progressively), minimum qualifications requirements for *Johnson* purposes are more likely at relatively high-level job positions and less likely at relatively low-level positions. Given that there are disparities among race and gender groups in the human capital investment measured by many minimum qualifications, the capacity of "voluntary affirmative action" to ensure proportional allocation of employment is limited. The greater the disparity in human capital investment between groups, the greater the likelihood that affirmative action will benefit only relatively elite members of minority groups. "Tokenism" within relatively high-level positions is therefore an implication of the minimum qualification requirement.[147] Ironically, race and gender preferences in relatively high-level positions may be quite visible. If the number of minorities possessing elite qualifications is low and the demand for minorities, stimulated by the Court's doctrines, is high, wage premiums for minority status may result.[148]

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[147]Some critics of affirmative action have argued that its effect is to aid minorities and women who possess valuable human capital investment portfolios and who therefore do not require this aid. *See, e.g.*, T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 50-53 (1984). On this premise, affirmative action has no effect on the problem of the permanent minority underclass. GLAZER, *supra* note 6, at 70-74. This argument is plausible in one sense and implausible in another sense. Its plausibility is a function of three factors: the extent to which minimum qualifications requirements survive the threat of legal attack under the disparate impact and systematic disparate treatment theories, the extent to which persons in the minority underclass are unemployable even within low-level jobs and the extent to which low-level jobs are available in the economy. If qualifications requirements for even low-level jobs survive, if the minority underclass cannot satisfy these requirements and if the supply of low-level jobs is low, then the argument is plausible. If qualifications requirements for low-level jobs do not survive, if the minority underclass is therefore employable and if the supply of low-level jobs is high, the argument is less plausible. Even on these latter suppositions, however, the argument remains plausible in the sense that minorities or women who satisfy minimum qualifications requirements for relatively high-level jobs are favored.

[148]*See* Winkes v. Brown University, 747 F.2d 792 (1st Cir. 1984).

At the same time, affirmative action of the sort contemplated by *Johnson* may have a greater likelihood of ensuring proportional allocation of employment within contexts in which persons lack valuable human capital investment portfolios. Ironically, the whites or males most likely to be affected by affirmative action under this interpretation more closely resemble the beneficiaries of affirmative action in the sense that they, too, will lack the forms of human capital investment measured by minimum qualifications that survive disparate treatment and the disparate impact theory.[149] Nevertheless, affirmative action may have no substantial effect on alleviating the condition of the minority or female underclass. A minimum qualification requirement suggests that only those employment opportunities for which very little or no

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[149]*See* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1476 (1987) (Scalia, J., dissenting). It is possible to claim that labor organizations are a source of economic power for such persons. Indeed, some justices have relied upon the fact that a labor organization agreed in collective bargaining to an affirmative action plan in concluding that the plan must not have unfairly harmed individual whites or males. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 303 (1986) (Marshall, J., dissenting). This argument necessarily assumes, however, that the labor organization's interests are compatible with those of the white males disfavored. There is certainly evidence of compatibility in some cases; unions have resisted affirmative action in litigation. *See, e.g.*, Firefighters Local No. 1784 v. Stotts, 467 U.S. 561 (1984). There are also cases in which unions have actively defended affirmative action, particularly in collective bargaining agreements. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979).

There are reasons to doubt that unions are viable representatives of persons disfavored by collectively bargained plans (and to doubt that unions are viable representatives of minorities or women in many instances). In the first place, political power within the union may disfavor particular interests. The origin and history of the duty of fair representation is adequate testimony of the absence in racial and other contexts of cohesion among bargaining unit employees or union members. *See, e.g.*, Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944). In the second place, the union is itself exposed to Title VII liability and its interests as an institution are at stake. Indeed, its incentive structure very much resembles the incentive structure of employers under Title VII. *See* Goodman v. Lukens Steel Co., 107 S. Ct. 2617, 2623-24 (1987).

A legitimate objection to this line of reasoning is that collective bargaining through an exclusive representative is a collectivist enterprise necessarily premised upon a theory of group rights. *See* Cox, *On Honoring Picket Lines: A Revisionist View*, 17 VAL. U. L. REV. 118 (1983). On this premise, negotiated plans should be respected simply out of deference to the collectivist structure of national labor policy. The difficulty is that the collectivist thrust of that policy has never been wholly respected and that it has, in fact, been ignored or rejected in the case of race and gender discrimination, both as a matter of judicial decision. *See* Vaca v. Sipes, 386 U.S. 171 (1967); and as a matter of statute. Civil Rights Act of 1964, (Title VII) § 703(c), 78 Stat. 241 (codified as amended 42 U.S.C. § 200e-2(c) (1982)). The resulting law may be characterized as a hodgepodge of individualist and collectivist values yielding no clear benchmark from which fairness to individuals may be derived. *See* Freed, Polsby & Spitzer, *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461 (1983). It is, however, not itself a basis for rejecting the relevance of questions of fairness to individuals.

human capital investment is required are open to persons who have had limited opportunities to acquire investment. If the demand for such persons is low, the capacity of affirmative action to affect employment of the underclass is limited.[150]

In addition to the limited scope of the Court's group rights model, there is a further *caveat* arising from *Johnson's* minimum qualifications requirement. It is at least possible to postulate a link between that requirement and the individualist model, and, therefore, to cast some doubt upon the claim that *Johnson* represents a triumph for the group rights model. On its face, the minimum qualifications requirement gives effect to the underlying notion, earlier attributed to the individualist model, that persons should be judged on the basis of their individual talents, accomplishments and attributes.[151] It is only after this judgment has been made that race and gender are considered as, in effect, additional attributes.[152] The group rights model suggested by *Johnson* is therefore ambivalent in that it contains meritocratic elements.

Nevertheless, there are two difficulties with this observation. First, the observation ignores the fact that the minimum qualifications at issue are of a highly refined sort; they are the survivors of the set of potential criteria subject to theories of liability that may be interpreted as implementing a group rights model. Second, the observation ignores the district court's finding in *Johnson*, a finding that would be necessary to any disparate treatment claim asserted by white males. The district court concluded that, but for his gender, Mr. Johnson would have been promoted.[153] That is a finding that Johnson's talents, accomplishments and attributes were not ultimately the basis upon which he was judged. Absent the affirmative action plan, these would have resulted in *Johnson's* promotion. The minimum qualifications requirement serves to allocate employment on the basis of the human capital investment measured by such qualifications, but forms of human capital investment not measured by minimum qualifications that would control allocation absent a race or gender preference are ignored. In short, race and gender ultimately trump meritocratic considerations. More importantly, the affirmative action plan at issue in *Johnson* removed gender from the category of "the person" to which it is relegated by the disparate treatment prohibition and moved it to the category of "attributes of persons;" it made of gender a meritocratic consideration.

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[150]*See supra* note 147.

[151]*See supra* text accompanying note 33.

[152]Indeed, the qualifications of the male and female candidates for the promotion at issue in *Johnson* were effectively equal. *See Johnson*, 107 S. Ct. at 1448.

[153]*Johnson*, 107 S. Ct. at 1449; *see also id.* at 1469 (Scalia, J., dissenting).

C. *Summary: Title VII's Incoherence*

In summary, then, *Johnson* is representative of a shift from the individualist model to the group rights model. "Voluntary" affirmative action is congruous with the disparate impact theory of Title VII both because that theory encourages race and gender preferences and because affirmative action provides a safe harbor from the disparate treatment claims of white males. Although affirmative action is characterized as a remedy for discrimination, the discrimination remedied is race and gender imbalance in the work force. White male interests may not be "unnecessarily trammeled" by affirmative action, but, with the exception of individual interests in currently held positions, white male interests are defined in terms of proportional representation of white males conceived of as a monolithic majority without regard to problems of distribution of resources, power or burdens within that "majority."

It is true that the Court has not directly pronounced the group rights model as controlling. Indeed, it continues to claim that affirmative action designed to achieve race and gender balance is merely "permitted," not "required." But the claim is disingenuous in the extreme. The shift from the individualist model to the group rights model has occurred through a systematic judicial effort to alter the incentive structure of the persons in control of allocation of employment opportunities—the employers and unions. Employers and unions are not formally subject to liability for failure to achieve balanced work forces, but they incur substantial risks of liability and costs of defense both in utilizing selection criteria correlated with race or gender and in having imbalanced work forces. They may, moreover, minimize these risks through conscious and formal efforts to achieve race and gender balance. Employers, therefore, have every incentive both to adopt affirmative action as an operating policy and to defend it so long as the incentive structure generated by Title VII theories of liability remains in place. To suggest that affirmative action is not required by this judicially created incentive structure is to engage in "newspeak."[154]

At the same time, it should be recognized that the group rights model thus adopted is of a limited variety because its greatest potential for redressing group disparities in the distribution of employment is within middle and lower socio-economic strata, both because of the respect for the vested positions of incumbent employees and because of the rhetorical deference to individualist values evidenced by the minimum qualifications requirement. The Court's adoption of a minimum employee qualifications criterion for measuring race and gender

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[154]*See* United Steelworkers v. Weber, 443 U.S. 193, 219-20 (1979) (Rehnquist, J., dissenting).

imbalance in *Johnson* suggests that professional and other "higher level" job categories are not fully subject to the group rights model.[155] This does not mean that affirmative action plans are not operative at such levels or that problems of unfairness to individual white males do not occur at such levels. Indeed, employer competition for minority and female professionals has been so keen in some instances that the courts have been forced to justify premium compensation for blackness and femaleness.[156] Nevertheless, the prospects for race and gender balance within occupations characterized by high levels of human capital investment are limited for the foreseeable future, at least with respect to race.[157] The minimum qualifications requirement, therefore, implies that affirmative action will not be used to cause redistribution of wealth along race or gender lines to the extent that would be possible if Title VII liability theories were less deferential to such qualifications and if the qualifications criterion had not been invoked in *Johnson*.[158]

The foregoing suggests that Title VII, as the Court has interpreted it, is incoherent. The Court, in cases in which the disparate treatment theory is invoked, strictly pursues the individualist model and rejects arguments from fairness to groups.[159] The Court, in cases in which the disparate impact theory is invoked, functionally pursues group interests in a fashion incompatible with the individualist model, while employing the rhetoric of the individualist model.[160] The Court, generally pursues group interests, again incompatibly with the individualist model,[161] but occasionally shifts to the individualist model on the few occasions where it has invalidated an affirmative action plan.[162] In short, the Court's resolution of any given case is dependent upon its discretion (or more properly, the "discretion" inherent in shifting and unstable majorities of justices) in choosing between underlying models of equality.[163]

This incoherence does not mean that it is impossible to reconcile the cases. A cynic could claim that the Court's invocation of individ-

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[155]*See supra* notes 29-54 and accompanying text.

[156]*See* Winkes v. Brown Univ., 747 F.2d 792 (1st Cir. 1984).

[157]*See* T. SOWELL, *supra* note 147, at 50-53 (1984).

[158]*See supra* note 147.

[159]*See, e.g.*, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

[160]*See* Connecticut v. Teal, 457 U.S. 440, 457 (1982) (Powell, J., dissenting); Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallocy of* Connecticut v. Teal, 20 HARV. J. ON LEGIS. 99 (1983).

[161]*See, e.g.*, Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987); United Steelworkers v. Weber, 443 U.S. 193 (1979).

[162]*See* Firefighters Local No. 1784 v. Stotts, 467 U.S. 561 (1984).

[163]*See generally* Fallon & Weiler, *supra* note 6.

ualist rhetoric is predictable where it is alleged that minorities or females are victims of disparate treatment[164] and that invocation of group fairness is predictable where it is alleged that whites or males are victims of disparate treatment.[165] But this is too simplistic a version of the "who's ox is gored" hypothesis. There are potential reasons for shifts between models and, therefore, potential grounds for cabining discretion. The question is whether these reasons are convincing.

III. Justifications of Group "Rights"

A. Three Varieties of Group "Rights" Theory

1. Community Theory.—There are roughly three versions of group rights theory. Under the first, groups are to be legally recognized as having inherent rights against the state, individuals and other groups, largely on the premise that persons are individuals distinct from social structures and, simultaneously, part of these structures.[166] Identification of relevant groups is through empirical observation of the existence of "communities." However, the rights of these communities are in some sense inherent; they are not derived from state-supported policies or versions of the social good, nor from individualist values.[167] Communities are spontaneous phenomena, rather than state-defined phenomena.[168] A community's insistence upon behavior incompatible with state-defined social good or individualist values would be tolerated as a matter of community rights. For example, a community's internal practice of subjugation of women might be respected as its "right,"[169] and it is possible that unequal distribution of resources and wealth

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[164]*See, e.g.*, Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

[165]*See* California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 293-94 (1987) (Stevens, J., concurring).

[166]*See, e.g.*, M. Sandel, Liberalism and the Limits of Justice 142-44, 173-74 (1982); Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. Rev. 1473 (1986); Cover, *Nomos and Narrative*, 97 Harv. L. Rev. 1 (1983); Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057 (1980); Garet, *Communality and Existence: The Rights of Groups*, 56 S. Cal. L. Rev. 1001 (1983); Macneil, *Bureaucracy, Liberalism, and Community—American Style*, 79 Nw. U.L. Rev. 900 (1984); Michelman, *Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986); Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985).

It should be obvious from the diversity of viewpoints in this list that there is substantial disagreement among advocates of "community" about just how the notion is to be worked out in practice.

[167]*See* Garet, *supra* note 166, at 1029-75.

[168]*See* Macneil, *supra* note 166, at 934-39.

[169]*See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

among communities might be tolerated on these grounds.[170] This version of group rights is, therefore, largely incompatible with race and gender preferences as these are currently administered. The most glaring incompatibility is that affirmative action treats white males as a monolithic group. A version of group rights sensitive to the spontaneous existence of community would be compelled to recognize the rights in subgroups of the white male "majority."[171]

There is, however, a version of community theory that might justify a governmentally compelled allocation of employment along group lines. A premise for recognition of community is the relativity of perspective.[172] One conclusion that may be derived from this premise is that, as perspective governs interpretation,[173] no norm can claim to be neutral. A merit criterion for employment, for example, is not neutral with respect to race or gender if distinct racial or sexual experiences yield distinct understandings either of the operational meaning or of the value of the quality measured by the criterion.[174] It arguably would seem to follow that a governmental decision about the use of such a criterion should be avoided, both because collective choice cannot be neutral as between perspectives (it expresses a perspective) and because private ordering permits expression and survival of alternative perspectives. There is, however, an alternative conclusion that may be derived from the relativity of perspective. To the extent that one concludes that resources have been so distributed that a "white male perspective" precludes entry by competitors, governmental prohibitions might be justified as a means of breaking down these barriers.

2. Governmental Distribution Theory.—The second version of group rights is predicated expressly upon some understanding of state-defined social good, in particular, upon distributive justice understood as at

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[170]*Cf.* Macneil, *supra* note 166, at 944-46 (community value may trump equality value). Indeed, the regime of Plessy v. Fergusson, 163 U.S. 537 (1986), particularly as "separate but equal" worked out in practice, would seem compatible with at least some versions of communitarianism. For example, it was commonplace for segregation to be defended on the basis of associational freedom. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455 (1973).

[171]*See* N. GLAZER, *supra* note 6, at 168-95, 202.

[172]*See, e.g.*, Minow, *Foreward: Justice Engendered*, 101 HARV. L. REV. 10 (1987). *Cf.* Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1169-71 (1986) (distortion of perspective is a justification for legal intervention, but distortion analysis risks elimination of autonomy).

[173]The extreme version of this position is that textual meaning is inseparable from the act of interpretation and that this act is governed by the interpretative stance of the community in which the interpreter is "embedded." *See* S. FISH, *supra* note 29.

[174]*Cf.* J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983) (generally comparing managerial and working class perspective on the meaning and value of work).

least rough equality of results among groups.[175] The group right recognized by this version is not a right in the sense that it trumps governmental policy. Rather, it is an expression of governmental policy.[176] Identification of relevant groups is through empirical observation by reference to the state-defined norm of equality. Groups, therefore, are not self-generated and spontaneous, as in the first version of group rights. Nor are they self-governing or respected as self-governing. State intrusion into them to protect individualist values would be permissable. Further, as the economic, social and political objective underlying recognition of the group is to ensure that no group be found consistently at the short end of distributions of resources or of wealth,[177] toleration of such inequalities is of course precluded. There is some tendency among advocates of this second version to rely upon elements reminiscent of the first, in particular in emphasizing the common historical experience of black persons or women to identify a common, subjugated community.[178] But these communities are more internally pluralistic than cohesive.[179] The primary rationale, therefore, remains distributive equality.[180]

3. Compromise Theory.—The third version of group rights theory tends to combine elements of the first two under an umbrella of individualist rhetoric. For example, the notion that individuals are constituted by community has permitted recognition of group rights on individualist rationales, particularly in the context of religion. A religious group's right to freedom from state interference is predicated upon the right of free exercise of its individual members.[181] In addition, the notion that no racial group should be found consistently on the short end of distributions of resources and wealth animates disparate impact liability and affirmative action. The primary distinction that identifies the third version is that it neither recognizes group rights as inherent nor expressly adopts distributive equality as social policy. Rather, it treats group equality as an instrumental means to individualist ends, thus retaining at least the appearance of adherence to a general rhetorical commitment to these ends. Thus, affirmative action is con-

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[175]*See* Fiss, *supra* note 1.

[176]The right is, then, a "statist" conception of a right, in Professor Mashaw's terminology. *See* Mashaw, *"Rights" in the Federal Administrative State*, 92 YALE L. J. 1129 (1983).

[177]*See* Fiss, *supra* note 1, at 151; Wasserstrom, *supra* note 6, at 584-94.

[178]Fiss, *supra* note 1, at 148-49; *see also* Blumrosen, *supra* note 160.

[179]*See* T. SOWELL, *supra* note 147, at 77-82, 92-102.

[180]*See* Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

[181]*See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

ceived as a remedial measure that must be temporary rather than permanent so that individualist competition among persons someday may proceed free of the unfair disadvantages generated by past discrimination.[182] Disparate impact theory is justified as a means of granting "individuals" equal opportunity free of "barriers" to opportunity that unfairly take these disadvantages into account.[183] Indeed, the Supreme Court's apparent exemption of "vested" employment rights from redistribution under affirmative action plans can be understood as a concrete instance of adherence to individualist rhetoric, as it treats the current positions of incumbent white males as possessions so identified with them that they should be respected.[184] Perhaps the Court's emphasis in *Johnson* upon retaining minimum qualifications has a similar individualist source. That is, perhaps white males are viewed as having a stake in employer-defined minimum qualifications because the white males are viewed as "owning" the attributes identified by these qualifications.

Nevertheless, the functional implications of the third version very much resemble the functional implications of the second version of group rights theory. The third version is a compromise theory in that it is functionally a group rights theory reconciled to individualist values through a tactic of instrumentalism. There is, however, a second distinction that distinguishes compromise theory. Unlike the first two theories, compromise theory is not utopian; it does not ground its version of the good upon an articulated system of moral or political thought. Rather, it grounds its version of the good upon authoritative legal texts, so that its recommendations are said to be compelled by, implicit in or at least not incompatible with the requirements of "law" as these are currently understood by lawyers.

Justifications of the first and second versions of group rights are dependent upon the conceptions of the good society underlying them. Neither version is implausible given acceptance of these underlying conceptions. Nevertheless, it is the third version that has found acceptance with the courts. Justifications of compromise theory, therefore, are here deemed interesting because it is apparent that these justifications will be seriously heard within a rhetorical practice that generally continues to eschew facial claims to "fair" distribution of race and gender shares.[185] This, of course, does not mean that such justifications actually

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[182]United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

[183]Connecticut v. Teal, 457 U.S. 440, 452 (1982).

[184]See *supra* text accompanying notes 134-53.

[185]The notion that particular forms of rhetoric will or will not be heard within rhetorical practice is obviously a reference to the position of Stanley Fish. *See* S. FISH, *supra* note 29.

connote mere instrumental means to individualist ends. At the level of theory, it is possible that the instruments are so incompatible with the ends that the ends lose both meaning in social experience and their persuasive power as rhetoric. As a matter of historical observation, it is possible that instrumental means can alter dramatically the vision of the social good that dominates rhetorical practice so that, over time, argument within a pure group rights vision may, by virtue of the implementation of instrumental means, become both heard and obligatory. The interesting character of justifications of compromise theory means only that it is these justifications, and the counter arguments that may be invoked against them, that are most plausible within current practice.

As compromise theory purports both to respect individualist values and to respect or to find its source in law, these would seem to constitute the relevant criteria for assessing compromise theory. There are two general lines of justification to be discussed here. The first seeks forthrightly to reconcile individualist values with a governmental policy of distribution of employment among groups by denying that a true account of individualist values is threatened by such a policy. The second attempts a reconciliation by claiming that a limited policy of focusing upon distribution among groups is a necessary means or technique of enforcing individualist values.

B. Limited Individualism and the Social Good

1. The Argument.—The first justification is that fairness, understood as rectification, or social welfare requires affirmative action and that the individualist model, properly understood, does not preclude it. The factual premise underlying this justification, unlike the factual premise underlying the second justification to be discussed below, is that the "meritocratic" considerations that otherwise would control in a free exchange are expressly ignored or devalued under an affirmative action plan; the human capital investment of persons disfavored under such a plan is trumped by race or gender. The first justification is therefore most compatible with a version of a compromise theory of group rights that approximates the second theory of group rights, the governmental distribution theory, noted above.

Fairness requires affirmative action for the reason that persons are not deserving of their human capital or of their lack of human capital where allocation of human capital investment has itself been influenced by race and gender.[186] Fair competition among individuals, therefore,

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[186]*See* United Steelworkers v. Weber, 443 U.S. 193, 214-15 (1979) (Blackman, J., concurring).

requires that misallocations be first rectified. An obvious difficulty with the fairness argument is that affirmative action of the sort upheld in *Johnson* bears a highly problematic relationship to misallocation; there is no effort to connect affirmative action entitlements to evidence of race or gender based misallocation, except by reference to the questionable assumption that all disparities in group representation within employment categories are necessarily attributable to misallocation.

The social welfare explanation avoids the difficulty encountered by fairness as rectification. It does so by postulating a straight-forward utilitarian rationale. Social welfare might be said to require affirmative action for purposes of social and political stability, economic efficiency or even fair allocation of employment among groups; a society in which there is equal distribution of employment among groups is a better society than one in which there is not.[187] The over- or under-inclusive character of the affirmative action remedy for misallocation is on this account of little force, as it is plausible that the remedy tends to correct misallocation, and in other contexts we do not require a precise fit of social welfare programs.[188] In short, fairness as rectification tends to collapse into social welfare as a justification of compromise theory because the *a priori* principle that distribution among race and gender groups should be equal is appealing and because rectification defined in group terms is simply a call for adoption of this principle.

This leaves, nevertheless, the problem of confronting the individualist model implied by the disparate treatment prohibition, because compromise theory purports to reconcile its recommendations with that model. As that model has been postulated thus far, it is that individuals are entitled, at least as a matter of common perceptions of individualist morality,[189] to employ and to realize the benefits of their individual talents and capacities without regard to their race or gender.[190] Thus described, the individualist model implies both that individuals are

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[187]*See* DWORKIN, RIGHTS, *supra* note 29, at 239.

[188]*Cf.* Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (tolerating underinclusive regulation as a matter of rationality review for equal protection purposes).

[189]"Common morality" is here employed as an appeal to consensus about moral commitments, in the sense that individualist rhetoric implies a consensus of this character about the demands of respect for persons and of their interaction. *Cf.* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 88-112 (1977) (describing ordinary adjudication as a process of working out rights and duties from rhetoric and consensus implied from rhetoric). Common morality is therefore to be distinguished from systematic morality, from the demands of an internally consistent theory of morality (e.g., Kantian morality) and from systematic utilitarianism, the demands of society as defined within an internally consistent theory of the social good (e.g., neoclassical economic analysis of law).

[190]See *supra* notes 29-53 and accompanying text.

entitled to their talents, capacities, experience, knowledge and other attributes and that these entitlements may be exercised through a right of free exchange.[191] The value of one's attributes for purposes of employment is dependent, within the individualist model, upon the valuation reached through consensual transactions in a market free of governmental intrusion.

Given this account of the individualist model, both the fairness and social welfare rationales for affirmative action are incompatible with individualism. To deprive a white male of an employment opportunity on the basis of his race or gender is, in a sense, to deprive him of his attributes because he is deprived of the valuation that would otherwise be placed upon these attributes. Moreover, if the governmental source of the race or gender basis of the employment decision is acknowledged, the deprivation is not a function of free choice in an interaction among individuals. If the individual to be respected under the dictates of individualism is defined to include attributes devalued by race and gender criteria, individuals so defined are not respected. This is so even if race and gender are not valued as such, so such criteria are not employed from prejudice but from their usefulness to society. The societal explanation quite directly asserts that the individual is to be sacrificed to the greater good.[192]

The strategy by which the most persuasive advocates of affirmative action seek to circumvent these difficulties is to proceed further down the path of stripping the individual of his or her attributes, and to therefore deny that a true account of individual rights is threatened by affirmative action.[193] In its most extreme form, this technique leaves the individual independent even of such characteristics as appearance or intelligence, and certainly of acquired attributes, such as human capital investments, on the ground that these are products of genetic, social and economic accident or circumstance.[194] In the form most

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[191]*See, e.g.*, R. NOZICK, *supra* note 29, at 149-231; M. SANDEL, *supra* note 166, at 66-72.

[192]M. SANDEL, *supra* note 166, at 72-77.

[193]*See, e.g.*, R. DWORKIN, LAW'S EMPIRE 393-97 (1986) [hereinafter DWORKIN, EMPIRE]; DWORKIN, PRINCIPLE, *supra* note 11, at 298-302; Fallon & Weiler, *supra* note 6, at 18, 39-44; Wasserstrom, *supra* note 6, at 619-21.

[194]*See generally*, J. RAWLS, *supra* note 29. Rawls technique, as he recently emphasized, was not designed to provide an amount of what counts as a person. Rawls, *Justice As Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985). Rather, he employed the technique as a device for defining the social structure within which the attributes and characteristics of real persons should be worked out. *See* Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895 (1985). Although the issue of what constitutes a just social structure is distinct from what constitutes a person, *id.* at 909, that distinction breaks down when such a just social structure is imposed on a real society inhabited by real persons. Any

pertinent here, the technique strips the individual of attributes that can be made to fall within the fairness rationale for affirmative action: attributes connected to race- and gender-based misallocations of social resources are no part of the individual because they are undeserved.[195]

The strategy by which the individual is rendered independent of his attributes is reinforced by noticing that the value placed on such attributes within the individualist model is arbitrary, in the sense, at least, that it is contingent upon historical, social and economic circumstance.[196] A capacity to make rock music is of no value in a society that listens only to Mozart. At least it is of no value in the sense material here—it is not rewarded with employment in private exchange. If the value placed on attributes is arbitrary, two conclusions would seem to follow: society is free to arbitrarily change its valuations and there is no individual right to any given valuation. Society is, therefore, free to value blackness or femaleness over, for example, educational or experience credentials. Such a valuation intrudes upon no right of a white male to a higher valuation of his credentials because it is society, in the person of the market, and not the individual acting autonomously, that places values on attributes privately exchanged.[197]

In the present context, moreover, society is free to correct a distribution of attributes that has its source in historical wrongs. That is, even if a persons's attributes are in some sense his, and even if a market mechanism rather than governmental authority generally should place valuations on attributes, still, attributes unjustly obtained may be governmentally redistributed or ignored.[198] A thief has no right to

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such imposition, where the imposed social structure is founded upon a conception of persons stripped of attributes, necessarily denies real persons their selves as defined by the displaced structure. The argument that the issue of structure and issue of personhood are distinct would therefore seem to render the argument for a particular structure trivial in the sense that the particular structure cannot properly be adopted until some theory of the person compatible with its imposition is devised.

[195]*See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 214-15 (1979) (Blackmun, J., concurring); Fallon & Weiler, *supra* note 6, at 39-44.

[196]*See* J. RAWLS, *supra* note 29, at 60-75; Fallon & Weiler, *supra* note 6, at 39-44; Wasserstrom, *supra* note 6, at 619-21. Of course, from the perspective of an adherent of individualism in the strong sense, the value placed attributes is not arbitrary. It is instead the value put in place by a free market through voluntary exchange, a mechanism itself linked to individualism. For such an advocate, moreover, there is a crucial difference between value as it is defined by society through a free market and value as it is defined by society through the intercession of government.

[197]"Society" in an unregulated economy makes valuation decisions through a market mechanism. As "voluntary" affirmative action is in fact governmentally-compelled affirmative action, society makes a racial valuation through authority, here the courts. *See supra* text accompanying notes 58-78, 113-64.

[198]Fallon & Weiler, *supra* note 6, at 41-42.

assets he has stolen or to the value a market would place on such an asset.[199] Society, therefore, is free to value blackness or femaleness as a means of correcting the race and gender based misallocations of resources that are the source of current distribution of attributes.

This strategy does not suggest, however, that society is free to value blackness or femaleness as such or to devalue whiteness or maleness as such. Such valuations, by the terms of the strategy, impermissably violate the sovereignty of what remains of the individual. What remains of the individual is very little indeed, but the being thus stripped of his attributes is entitled to "equal concern and respect."[200] Society cannot legitimately treat this being as more or less valuable than his fellows for reasons of the attributes that have been stripped from him. It may merely treat his attributes as more or less useful for particular social ends.[201] On this account, the white male may be denied employment opportunity and the black female granted employment opportunity for reasons of fairness or of social welfare, but not for reasons of "prejudice."[202] This is the reason that affirmative action is said to be distinguishable from the traditional forms of discrimination it is supposed to correct. Traditional discrimination devalued individuals by conceiving them as inferior in themselves; affirmative action values and devalues for purposes of pursuing the social good.[203]

2. Some Counterarguments.—

a. The Impoverished Individual.—There are a number of things wrong with this reconciliation of affirmative action and individualist values. First, the individual as thus conceived is so impoverished that the strategy of stripping individuals of attributes collapses into utilitarianism.[204] At least where the strategy is pushed to extremes, individuals are fungible, not distinct, and are valued as abstractions, not for their distinctness. It is true that the strategy values all equally; the white male is not disadvantaged because whiteness or maleness is thought to be inherently inferior and the black female is not advantaged because blackness or femaleness is thought to be inherently superior.

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[199]*Id.* at 41.

[200]DWORKIN, RIGHTS, *supra* note 29, at 272-78; J. RAWLS, *supra* note 29, at 504-12.

[201]DWORKIN, PRINCIPLE, *supra* note 11, at 301-02.

[202]*Id.*

[203]*Id.*; J. ELY, *supra* note 6, at 170-71; Fallon & Weiler, *supra* note 6, at 37-38; Greenawalt, *supra* note 6, at 579-94; Karst, *supra* note 6, at 65; Wasserstrom, *supra* note 6, at 618.

[204]M. SANDEL, *supra* note 166, at 135-47; R. NOZICK, *supra* note 29, at 228. *See* Radin, *supra* note 29, at 1903-09; Radin, *Property and Personhood*, 34 STAN L. REV. 957 (1982).

To the extent, however, that the individual is said to have no entitlement to his attributes, so that society, in the person of government, may value these attributes as it wishes, the beings remaining are abstractions with merely a metaphysical version of the self intact. It is a small consolation to real individuals with real selves defined by attributes that they are equally valued as means to socially desirable ends.[205]

Of course, this objection may also be made to individualism's reliance on impersonal markets for valuations of attributes; the social utility of the attributes of persons is then merely measured by alternative means. Individualism asserts its own version of the impoverished individual in claiming that attributes may be valued in the market but that persons, considered apart from their attributes, may not be subjected to the valuations either of the market or of government.[206] The objection assumes, however, that there is no distinction meaningful to persons in the means by which attributes are valued. Individualism asserts that persons are entitled to their attributes and that the priority of the individual is expressed through this entitlement. The social means by which attributes are valued is therefore crucial to individualism: persons must be collectively treated as equals, but collective valuations of attributes denies the priority of the individual.[207] Market valuation of attributes is not thought to entail this denial both because participation in the market (through alienation of attributes) is consensual and because such participation is thought to be expressive of the priority of the individual.[208]

The questions of the extent to which an entitlement to attributes is important to the notion of the priority of the individual and, therefore, of the permissible scope of governmental distinctions between persons is, of course, debatable.[209] Our judgments about that question may be influenced by our empirical judgments, themselves structured by our political commitments,[210] about the likely self concepts of per-

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[205]M. SANDEL, *supra* note 166, at 141-44.

[206]*See supra* text accompanying notes 29-52.

[207]*See supra* text accompanying notes 29-52; *infra* text accompanying notes 219-36. The notion that persons are entitled to their attributes and to engage in the process of their exchange may be grounded on the priority of the individual, so that the entitlement is derivative of or inherent in the concept of the person. *See* R. NOZICK, *supra* note 29, at 183-231. Alternatively, the notion that attributes may be valued in a market but persons apart from these attributes may not be valued (either in a market or by government) may be grounded on the argument that no one is competent to provide an authoritative valuation. *See* F. HAYEK, *supra* note 31, at 85-102. The latter argument appears premised more upon a moral relativism than upon a theory of entitlement. *See*, *supra* note 31.

[208]*See* R. POSNER, *supra* note 6, at 88-115.

[209]*See generally* Radin, *supra* note 29.

[210]*Id. See generally* T. KUHN, *supra* note 29.

sons. For example, one committed to the notion that workers are alienated by work in a market economy and experience disempowerment through reification of market forces[211] may conclude both that work experience is a meaningless aspect of the individual and that workers, in fact, view attributes connected to their work as separate and distinct from themselves. One committed to free market exchange as an expression of and a means to self-actualization may come to the contrary conclusion.[212]

Nevertheless, the stripping of attributes strategy leaves the individualist value unrecognizable because it locates the individual's right to "equal concern and respect" in an impoverished individual indistinguishable from his fellows. The individualist value is distinguished by its celebration of the distinctness of the individual and by its claim that this distinctiveness is to be preserved from governmental valuation.[213] We are left, then, less with reconciliation than with a need to choose between pursuing the social good and enforcing a stronger version of the individualist value.

b. Individual Responsibility.—The second difficulty with the reconciliation, particularly when it relies upon a principle of rectification, is that the grounds upon which the individual is to be stripped of his attributes are problematic. *Johnson*[214] is illustrative: should the human

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[211]*See, e.g.*, K. MARX, CAPITAL, in ESSENTIAL WORKS OF SOCIALISM 133-44 (I. Howe ed. 1971). *Cf.* A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 302-04 (E. Cannan ed. 1976) (describing alienation of workers generated by division of labor).

[212]*Compare* West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) *with* Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986).

It is possible that the Supreme Court has recognized this point both by exempting from permissible race and gender preferences vested claims to employment and by conditioning preferences on minimum qualifications. These features of the Court's case law may be characterized as recognizing the personal (as well as economic) stake of white males in currently possessed jobs and in attributes and credentials. Perhaps the Court's criteria reflect a rough guess about the relative importance of these stakes to the self. But the Court's limitations on affirmative action are prudential; they enforce mere expectations, not rights, and are therefore subject to being overcome by social need or by the morality of equal distribution.

[213]There is, however, another contradiction in the individualist position: its treatment of race and gender as inalienable, particularly given its aspiration that we become "color blind" and "sex blind" (or that assimilation occur), may be characterized as denying attributes of persons that are clearly viewed subjectively by persons as crucial to their self-concept—race and gender. *See* Wasserstrom, *supra* note 6, at 585-87. Whether this is so would seem to be dependent upon whether one views a rule of inalienability as enforcing or denying personhood, but the general commitment of individualism to alienability arguably generates a contradiction. *See* Radin, *supra* note 29, at 1898-1903.

[214]Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

capital investment decisions and the ambitions of women and of the family units within which they were nurtured be counted as a misallocation which explains workforce disparities? They might be so counted on the hypothesis that they reflect internalization of sexist role definitions. Alternatively, should human capital investment decisions instead be treated as legitimate expressions of the values of individual free choice and respect for the family as a "community"? If these decisions are not to be respected, the rectification principle underlying the fair competition rationale is in operation a principle of redistribution; it in effect calls for a new starting point for distribution. This should not be surprising. As the rectification argument proceeds from the premise that disparities in distribution of employment between groups are to be rectified, fairness is merely another means of asserting that distribution should be equal.

The rectification argument is questionable for another reason. It fails to seriously address the question of just what should count as an undeserved current holding. For example, should a white male's current holding of some number of years of experience in a job be ignored in preference to race or gender because society has generally excluded minorities or women from the opportunity to obtain such experience? Instead, should there first be a determination that the white male would not have had the experiences but for his employer's exclusion of minorities or women, or even that the white male in some degree participated in the exclusion policy? A conclusion that societal discrimination, particularly where defined to include human capital investment decisions of minorities and women, is a sufficient ground for rectification again implies a simple policy of redistribution, because it denies the importance of a causal relationship between current holdings and past injustice, a relationship central to an individualist ethic.[215]

It is in a sense true that an individual's attributes are largely the product of accident, but it is also true that they are the product of his interaction with the accidents of his past circumstances; he has some claim to the fruits of his more or less conscious interaction.[216] It is also in a sense true that current allocations of attributes have been affected by a history of intentional discrimination. It is not true that all disparities in allocation among race and gender groups are attributable to discrimination[217] (unless discrimination is tautologically defined merely as all causes of current disparities). It is, finally, in a

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[215]*See, e.g.*, R. NOZICK, *supra* note 29, at 150-55.

[216]*See, e.g.*, R. NOZICK, *supra* note 29, at 155-60; J. LOCKE, *supra* note 29, at ch. VI.

[217]*See generally* T. SOWELL, ETHNIC AMERICA (1981).

sense true that white males as a group have benefited by past discrimination, at least to the extent that past discrimination has freed them from competition from minorities and women in acquiring portfolios of human capital investment. The extent to which a given individual may be said to possess tainted attributes, however, is problematic; the connection between his set of attributes and past discrimination or his participation therein is both unproven and in any event tenuous. His possession is not, in short, analogous to that of a thief's possession of stolen goods.

It is quite possible to conclude that these considerations are outweighed by social need (or by the morality of equal distribution among groups). However, the conclusion is not a reconciliation; it is a conclusion that social need trumps individualist considerations. It is, moreover, a conclusion incompatible with the historical, transactional and causal analysis of entitlements that characterizes individualism.[218] The conclusion substitutes for that analysis a focus upon a desired end-state—distributive equality—without regard to the question of individual responsibility for a current distribution. Again, it is, of course, possible to reject the notion of individual responsibility as a condition to reallocation, but such a rejection is not a plausible reconciliation.

c. Prejudice.—The third difficulty with the reconciliation is that the strategy's understanding of prejudice is problematic. The question of prejudice was addressed at an earlier point in this article in assessing the scope of the disparate treatment prohibition.[219] The question addressed in that discussion, however, was whether the disparate treatment prohibition, which is broader than a prohibition of prejudiced disparate treatment, could be justified on individualist grounds. The premise of that question was that unprejudiced disparate treatment is a private phenomenon currently uncoerced by governmental authority. This premise is not available in the present context. Given the relationship between liability theories and "voluntary" affirmative action, and the stripping strategy's emphasis upon the social utility of race and gender criteria, the present question is whether a governmental policy of fostering use of such criteria is, as the stripping strategy suggests, unprejudiced.

Recall that a race or gender preference granted for some socially desirable end, such as remediation of past wrongs, is not granted from prejudice under the stripping strategy because the person advantaged is not treated as inherently superior for reasons of race and the person disadvantaged is not treated as inherently inferior for reasons of race.[220]

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[218]*See, e.g.*, Gjerdingen, *The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought*, 35 BUFFALO L. REV. 871, 876-78 (1986).

[219]*See supra* text accompanying notes 45-54.

[220]*See supra* text accompanying notes 193-203.

Rather, the advantaged person is merely more useful for the social purpose at hand. One difficulty with this notion is that it is not clear, given an historical social practice of prejudice, either that the persons affected will so perceive the matter or that the decision maker's stated motivation can be trusted.[221] But this objection can be left aside for the moment. The more important objection is that it remains the case that persons are advantaged or disadvantaged by reason of race because the advantaged race is viewed as superior for purposes of the social use in question. In what sense is this not a prejudiced view of the race of the disadvantaged person?

A dictionary definition of prejudice is "an adverse opinion or leaning formed without just grounds or before sufficient knowledge".[222] Apparently, then, the strategy treats contempt for a race, as such, as an unjust ground but use of race for a socially desirable purpose as a just ground for the "opinion" by which employment is allocated. In effect, race is no different as an employment criterion under the strategy than possession of a college degree where contempt is absent: both persons denied employment because they were white and persons denied employment because they lack such a degree are not useful for some legitimate reason independent of the worth of the persons in issue.

This claim assumes both an understanding of that which constitutes the person and may not be socially used and an understanding of that which is distinct from persons and may be socially used—the impoverished individual understanding. It assumes, as well, an understanding of legitimate use, in particular, of the permissible scope of collective decision regarding use.[223] Neither assumption is reconcilable with the individualism of the disparate treatment model, but an understanding of this irreconcilability requires an extended discussion of the respects in which the stripping strategy differs from the separation of person and object in traditional individualist theory.[224]

Arguably, the problem of prejudice from the perspective of the individualist value underlying the disparate treatment theory is that the opinions of persons formed from prejudice fail to recognize the distinctness of individuals.[225] The opinion thus formed is "unjust and

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[221]*See supra* text accompanying notes 45-49.

[222]WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 928 (1985).

[223]*See* T. SOWELL, A CONFLICT OF VISIONS 153 (1987) (contrasting versions, of individualism, according to one of which individualism consists of freedom to choose within a systematically generated structure not collectively determined and according to the other of which individualism consists of freedom to participate in collective determinations).

[224]*See supra* note 29.

[225]Celebration of the distinctness of the individual, including the distinctiveness of

without sufficient knowledge" because it is formed by reference to a generalization about the race or gender group with which the individual is identified and not by assessment of the individual. However, this will not suffice as explanation. An employer's use of a college degree as a proxy for estimating projected job performance relies as well on a generalization and not upon a particularized assessment of the individual. The claim that it is a particular form of generalization—hostility or contempt for race and gender groups—that is the true understanding of impermissible prejudice, thus, seems to have merit. Otherwise, individualism's distinction between permissible and impermissible proxies appears arbitrary.

The matter, however, is considerably more complex than this. Recall that in the version of individualism characterized by operation of a free market, there is a separation of the capacities of persons to confer benefits on others, which are valued by an impersonal market, from the persons engaged in transacting. These persons are of ultimate value, but are not subject to the valuations either of the market or of government in the sense that distinctions between persons are generally impermissible.[226] This separation is the means by which individuals are said to be equal before the law or to have rights to equal opportunity (the realm of the person) but are simultaneously and properly unequal in their attributes and possessions. The individual is rendered free in the senses that there is no authoritative valuation of his self other than that he supplies and that the individual is entitled to employ his distinctive resources (his attributes) in formally consensual transactions.[227] Persons (including employers and employees) transact in a free market under these assumptions using generalizations (such as existing human capital investments) as proxies for the benefits individuals can confer on others by virtue of their attributes, except that race and gender status may not be used as such proxies under the disparate treatment prohibition.

The exception for race and gender is attributable to a belief that generalizations about race and gender are valuations of persons rather than of the benefits that such persons are capable of conferring on others and are thus deemed illicit. This belief, when authoritatively enforced through the disparate treatment prohibition, constitutes a

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talents and abilities, is basic to traditional notions of individualism. *See, e.g.*, R. NOZICK, *supra* note 29, at 228-29.

[226]*See supra* text accompanying notes 29-54. Distinctions are, of course, made for limited purposes, as in cases of corrective justice.

[227]It is disputable whether this separation in individualism operates to celebrate the individual or is instead alienating. *See supra* note 29.

collective characterization of personhood.[228] Nevertheless, the exception is quite narrow; persons, viewed apart from their attributes, are not generally valued by a market and are not generally subjected to collectively determined valuations in individualist theory. This is the source of individualism's claims that the law ought to be neutral; government should not be permitted to distribute wealth by reference to desert because to do so is to value persons differently.[229] It is also the source of individualism's preference for market mechanisms—valuation of attributes by reference to an impersonal market avoids individualism's objection to collective valuations, that no person or group of persons is competent to formulate measures of desert, apart from those measures necessary to a system of corrective justice.[230]

There are obvious parallels between this account of individualism and the reconciliation strategy's effort to justify affirmative action: both separate individuals from their attributes and purport to value not the impoverished persons yielded by this separation but, rather, the utility of the attributes severed from persons. There is, however, this important difference: the defense of affirmative action has as its objective the imposition of centrally and collectively determined valuation of race and gender by separating these attributes from persons. By contrast, individualism rejects both "commodification" of race and gender *and* central and collective valuation. This is more than a mere restatement of the obvious point that the disparate treatment prohibition precludes, and affirmative action permits, use of race and gender as criteria for allocating employment. It has important implications for the scope and meaning of liberty as that term is understood under individualist and collectivist conceptions of the good society.

The central objection of individualism to collective decision, an objection grounded in individualism's moral relativism, is the incom-

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[228]*See* Radin, *The Consequences of Conceptualism*, 41 U. MIAMI L. REV. 239 (1987). *Cf.* Radin, *supra* note 29, at 1891-98 (generally noting the problem of distinguishing between that which is alienable from that which is not in the person-object dichotomy).

[229]Radin, *supra* note 29, at 1891-98. As expressed in political theory, the notion of neutrality is that government may not prefer one conception of the good to other conceptions of the good; it may not "take sides." *See, e.g.*, J. LOCKE, A LETTER CONCERNING TOLERATION (J.W. Gough ed. 1966). A difficulty with the neutrality proposition is of course the legal realist's point that governmental neutrality is impossible; the law inevitably takes sides. *See, e.g.*, Hale, *Force and the State: A Comparison of Political and Economic Compulsion*, 35 COLUM. L. REV. 149 (1935). For a recent statement of the neutrality value, see Stewart, R*egulation in the Liberal State: The Role of Non-Commodity Values*, 92 YALE LJ 1537, 1539-49 (1983). For a recent statement of the impossibility of neutrality, see Sunstein, *supra* note 29.

[230]*See generally* T. SOWELL, *supra* note 223 (arguing that distrust of the competence of collective decision is at the root of positions often characterized as individualist).

petence of central authority.[231] This objection would have no force in the context of "voluntary" affirmative action if the fiction is entertained that race and gender are benignly used by employers in that context merely as a matter of private decision. We have seen, however, that this characterization *is* fictional: affirmative action is not separable as a phenomenon from the liability theories that give rise to the incentives to engage in it.[232] Individualism's objection to collective decision is, therefore, relevant; affirmative action expresses a collective valuation founded upon an evaluation of desert and expressed through the proxy of race or gender status. Moreover, the affirmative action phenomenon is related to the historical phenomenon of invidious discrimination in precisely the respect that rendered a disparate treatment prohibition appealing to individualism.[233] Individualism could be persuaded to render race and gender inalienable, to assign race and gender to the realm of person rather than the realm of attributes, because the regime of racism and sexism was enforced by means of, and, in many respects, had its origin in, collective decision enforced coercively through state power.[234] The market mechanism for valuing attributes was, therefore, both circumvented by and tainted by centralized valuation, a state of affairs remedied by rendering race and gender inalienable.[235]

Individualism's analysis is distinguished from the strategy of stripping individuals of attributes in three respects. First, race and gender are, under the disparate treatment prohibition, inalienable aspects of

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[231]*See generally* F. HAYEK, *supra* note 31; R. NOZICK, *supra* note 29, at 153-74.

[232]*See supra* text accompanying notes 58-78, 113-64.

[233]For examples of individualist rhetoric used to support enactment of the disparate treatment prohibition, see generally Reynolds, *supra* note 33.

[234]*See, e.g.*, Lee v. Washington, 390 U.S. 333 (1968) (segregated prisons); Johnson v. Virginia, 373 U.S. 61 (1963) (segregated courtrooms); Turner v. Memphis, 369 U.S. 350 (1962) (segregated restaurants); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (segregated beaches); Brown v. Board of Educ., 349 U.S. 294 (1954) (segregated schools). The effect of state and local law on private conduct is illustrated by state action cases treating private conduct pursuant to state-imposed custom as state action. *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963).

[235]*See* R. POSNER, *supra* note 6, at 351-58 (1981) (arguing that an unregulated market would minimize discrimination and that laws enforcing discrimination circumvented the normal effect of such a market); T. SOWELL, MARKETS AND MINORITIES 103-24 (1981) (arguing that government policy affects operation of markets and may increase discrimination, but also arguing that government policy is often ineffectual). *Cf.* Sunstein, *supra* note 172, at 1153 (distortion of private preference for discrimination generated by law is justification for governmental interferences with such a preference). It should nevertheless be apparent that radical individualism, understood as distrust for collective decision, would be suspicious, at best, of a claim that a central authority may competently distinguish between distorted and undistorted preferences. *See* Epstein, *A Last Word on Eminent Domain*, 41 U. MIAMI L. REV. 253, 259-63 (1986).

the person removed even from the realm of legitimate valuation by markets; they are, under the stripping strategy, attributes subject to governmental valuation. Individualism legitimately views affirmative action as prejudiced in the sense that it purports to value an aspect of its version of personhood.

Second, the stripping strategy separates persons and attributes for the purpose of rendering the latter subject to collective valuation and use; individualism separates persons and attributes for purposes of rendering the latter exchangeable in markets. Individualism would object to affirmative action even if race and gender were assigned to the realm of attributes; affirmative action is prejudiced in the sense that it reflects an unjustified collective valuation both of race and gender and of the "meritocratic" attributes competing with race and gender.

Third, the stripping strategy treats attributes separated from persons as independent of persons in the strong sense that they are subject to collective allocation; individualism separates attributes from persons, but does so in the much weaker sense that persons retain strong claims to them, even as they alienate them in the marketplace. Indeed, individualism celebrates the distinctiveness of the attributes of individuals even as it insists upon the equality of persons and treats the process of transacting in attributes as liberating.[236] From this perspective, affirmative action is prejudiced in the sense that it denies the distinctiveness of individuals through collective valuation of status.

d. Pedagogy.—In individualist theory, individuals are viewed as autonomous actors whose references and choices are autonomously and rationally selected. An alternative understanding is that preferences, choices and even self-understanding are socially determined.[237] The alternative understanding is a potential basis for adopting centralized

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[236]*See, e.g.*, R. NOZICK, *supra* note 29, at 235-65.

[237]*See, e.g.*, Sunstein, *supra* note 172 (generally describing ways in which private preferences may be distorted, including by means of social structures or practices).

It is possible to claim that this tendency to internalize social valuations renders the autonomous individual postulated by the individualist model an impossibility. *See* Schuck, *Regulation, Non-Market Values, and the Administrative State: A Comment on Professor Stewart*, 92 YALE L.J. 1602, 1604-05 (1983). If the autonomous individual does not exist, there is no principled basis for precluding a collective decision to remold socially determined individuals. *Id.* This, however, overstates both the hypothesis that individuals are largely constituted by social valuations and the limited point made in the text that social valuations have a pedogogic impact. *See* Epstein, *supra* note 235, at 259-63. Indeed, it is clear that individualists have often accepted at least versions of the thesis that individuals are blank slates until influenced by society. *See* J. LOCKE, *An Essay Concerning Human Understanding*, in 1 THE WORKS OF JOHN LOCKE 134-79 (repl. 1969). Even if an extreme version of this thesis were accepted, there would remain the fundamental question of just who is competent to decide which private preferences are permissible and which are not.

collective valuations of attributes, because it denies that individuals are self-determining free agents. Even given, however, that individuals are in some degree socially determined, it is not clear that a collective valuation of race or gender is desirable. The stripping strategy may have an unintended pedagogic consequence.

In actual social practice, some attributes, such as a given number of years of job experience, are highly valued and real individuals either possess or do not possess these attributes. A remedial racial preference imposed within such a context now permits race to trump the attribute. What are the persons negatively affected by this change to make of it? The superseded attribute is a part of the person disadvantaged by the preference and a part of his sense of self. It is the case that the value he placed on this part of himself is at least arguably attributable to social context; he has perhaps derived it from the former social practice of valuing the attribute. The likely consequence of the social devaluation of the attribute is resentment and perhaps eventual feelings of inferiority and absence of self-worth, but we tolerate both revaluations and their consequences generally. Farmers and steelworkers have, for example, been devalued, and our concern as a society for the resulting potential for suicide is passing at best.

What of the person advantaged by the preference? The absence of the formerly valued attribute was equally a part of that person and a part of his sense of self. However, it has been devalued. What is he to make of its devaluation and of the elevation of race to a higher value? According to the strategy, very little, for he is not formally permitted to consider his race something good in itself; he is permitted only to recognize that his race is an attribute society has now found useful for its purposes. Similarly, the person disadvantaged is not supposed to consider his race something bad in itself, he is supposed to recognize that it has not been found currently useful. Indeed, the person disadvantaged erred in formerly thinking the devalued attribute a valuable part of himself; his internalization of society's valuation was a mistake.

Nevertheless, the disadvantaged person also made that mistake, and both he and the advantaged person are likely to repeat it under the new valuation regime. Social valuations of attributes are not merely the judgments of markets or of governments; they become in time internalized conceptions of the self.[238] If social valuations are inter-

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[238]Models of self-concept suggest that this concept is in part a matter of personal attributes, in part a matter of role definitions and in part a matter of perceptions of social valuations of attributes and role. *See, e.g.*, M. ROSENBERG, CONCEIVING THE SELF 62-77 (1979); Feather & O'Brien, *A Longtitudinal Study of the Effects of Employment*

nalized, a formal and governmental revaluation fosters prejudice because it is at least doubtful that persons affected by it will either be convinced by, or retain the distinction between, prejudice and utility. The reason for this predicted failure seems clear; people are not inclined to think of themselves merely as useful for social purposes even if the source of their self-valuation is ultimately social utility. Placing value on race and gender for reasons of social utility may have the consequence of placing value on race and gender for purposes of self-valuation and self-conception. The contention that a distinction may be drawn between social valuations founded upon utility and social valuations founded upon prejudice is, then, problematic precisely because it is crucially dependent upon the abstraction of the impoverished individual.

e. The Suffering of Innocents.—A further counterargument is that affirmative action, if viewed as a remedy for historical discrimination and, therefore, as a means of ensuring fair competition, is insufficiently general.[239] The argument is implicit in the notion that the responsibility of individual white males for current conditions of unfairness is problematic. If fairness, nevertheless, requires that persons who suffered from past discrimination be compensated, the burden of this remedy should be shared generally, not imposed arbitrarily on isolated individuals.

It is claimed, however, that both disparate treatment theory and group rights theories cause innocent people to suffer, so the alternatives are indistinguishable in this respect.[240] Innocents are made to suffer under a strict application of disparate treatment theory, and in a variety of ways. Indeed, innocents are made to suffer whenever disparate treatment theory is applied so as to prohibit rational use of race or gender as proxies. Assume, for example, the facts of the *Manhart* case.[241] Prohibiting the use of gender in calculating pension contributions harms innocent males by forcing them to subsidize females and by rendering the actuarial value of male benefits less than the actuarial value of female benefits for similarly situated individuals. Indeed, the prohibition requires use of neutral criteria that have a disparate adverse

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and Unemployment on School-Leave 59 J. OCCUPATIONAL PSYCHOLOGY 121 (1986); Hoelter, *The Structure of Self-Conception: Conceptualization and Measurement*, 49 J. PERSONALITY AND SOCIAL PSYCHOLOGY 1392 (1985); Schaer & Trentham, *Self-Concept and Job Satisfaction: Correlations Between Two Instruments*, 58 PSYCHOLOGICAL REPORTS 951 (1986); Yount, *A Theory of Productive Activity: The Relationships Among Self-Concept, Gender, Sex Role Stereotypes, and Work-Emergent Traits*, 10 PSYCHOLOGY OF WOMEN Q. 63 (1986).

[239]*See* Johnson v. Transportation Agency, 107 S. Ct., 1442, 1476 (1987) (Scalia, J., dissenting).

[240]*See* Strauss, *supra* note 6, at 103, 110-11.

[241]City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978). *See supra*, text accompanying notes 15-16.

effect on males as a group.[242] Permitting use of gender in calculation avoids this harm but generates a new form of harm: the periodic and current compensation of an individual female employee is less than the periodic and current compensation of a similarly situated male employee. Moreover, both prohibiting and permitting use of gender in this context renders gender visible; it is visible in the female's paycheck where use is permitted and it is visible in the actuarial value of the male's pension benefit where use is prohibited.

The inevitability of suffering under both possible legal regimes is, however, beside the point. The point is that either regime imposes the particular form of suffering that is the consequence of denial of an "ought." The distinction between the regimes is that distinct "oughts" are denied by them. The regime of permission denies the "ought" that race or gender status should be rejected as criteria. The regime of prohibition, while enforcing this "ought," denies the distinct "ought" that race and gender groups should enjoy a fair distribution of employment.

To understand why these "oughts" are at stake in the suffering of innocents argument, it is necessary to briefly explore the requirement of generality as that requirement is understood within individualist theory. Specifically, neither the requirement of generality nor the more restrictive requirement of neutrality preclude within individualist theory wealth transfers for public purposes through taxation or the enforcement of, for example, rules of contract against a person whose version of the good is thereby coercively denied by the state.[243] Moreover, individualist theory tolerates, in degree, inalienabilities.[244] The disparate treatment prohibition is an example. In short, the suffering of innocents is a possibility even given generality and neutrality requirements. It is true that an absolute version of the requirements would render government impossible, so individualism, by reference to such a version, is self-contradictory.[245] Nevertheless, individualists have insisted on government as necessary to individualism,[246] so the requirements have not

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[242]*Manhart*, 435 U.S., at 710-11 n.20.

[243]*Cf.* Sunstein, *supra* note 29, at 878 (so suggesting under the regime of Lochner v. New York, 198 U.S. 45 (1905)).

[244]*See* 2 J.S. MILL, PRINCIPLE OF POLITICAL ECONOMY 300-06, 442-80 (Colonial Press ed. 1899). The degree to which adherents to individualism tolerate inalienabilities varies with the adherent. *See* Radin, *supra* note 29, at 1859-63.

[245]*See, e.g.*, Frug, *Why Neutrality*? 92 YALE L. J. 1591 (1983); Radin, *supra* note 29, at 1902.

[246]*See, e.g.*, J. LOCKE, *supra* note 29; J.S. MILL, *supra* note 244; R. NOZICK, *supra* note 29. The question, then, is not the choice between either-or possibilities postulated by collectivist rhetoric. The question, rather is how much government and in what form, can be justified.

been treated as absolutes, but as aspirations to be more or less realized in practice.

In particular, the generality requirement is thought to be satisfied if collective decision appears both grounded on a purpose to further the common good[247] and does not benefit or burden relatively limited and identifiable groups of persons.[248] Neutrality is thought to be satisfied, under one version of the requirement, if collective decision may be traced to a legitimate public purpose.[249] Under another version, the requirement is satisfied if collective decision does not, *ex ante*, formally distinguish between persons or relatively identifiable groups of persons, so individuals may comply with the decision, *ex post*, through action formally possible because unrelated to immutable status.[250]

It is obvious that neither requirement under these formulations yields determinate conclusions. At a minimum, the notions of legitimate public purpose and relatively limited and identifiable groups leave much room for dispute. This, however, is the point; the formulations become at least more determinate when linked to underlying "oughts" and to the values and judgments that yield these "oughts."[251] It is, for example, possible to justify affirmative action as neutral and general, despite the suffering of innocents, by postulating redistribution as a legitimate public objective, by speculating that all will eventually benefit by such a redistribution, and by narrowly construing the entitlement upon which the claim to a neutral collective decision is based (persons are entitled to be free of prejudiced distinctions).[252] Similarly, it is possible to reject affirmative action as non-neutral by rejecting redistribution as a legitimate objective, by speculating that only an identifiable few will be burdened and by more broadly construing the entitlement upon which the neutrality claim is based (persons are entitled to be free of race

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[247]The "public purpose" requirement of the takings clause of the Fifth Amendment is an example. *See* R. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 161-81 (1985). *But see* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (rendering public purpose requirement a dead letter).

[248]*See* F. HAYEK, *supra* note 31, at 154.

[249]*See* DWORKIN, PRINCIPLE, *supra* note 11, at 301-02. *Cf.* R. NOZICK, *supra* note 29, at 272-73 (rules are neutral if justified by a reason independent of granting differential benefits); F. HAYEK, *supra* note 31, at 154 (rule is neutral even if it distinguishes between groups if the distinction is recognized as legitimate by members of both of these groups).

[250]*See* F. HAYEK, *supra* note 31, at 148-59. Action is only "formally" possible *ex post* because the standard critique of this position is that such relatively neutral rules in fact favor or disfavor identifiable groups or persons (particularly those without power, wealth or resources). *See, e.g.*, Hale, *supra* note 229.

[251]*Cf.* Sunstein, *supra* note 29, at 903-10 (choice of baseline is necessary in assessing neutrality).

[252]*See, e.g.*, DWORKIN, PRINCIPLE, *supra* note 11, at 301-02.

or gender distinctions).[253] The claim that innocents are made to suffer from a non-neutral and insufficiently general policy of affirmative action is both permissible and accurate given the latter of these arguments.

Does the claim made presently that arguments from generality and neutrality require reference to underlying values and judgments defeat the claim made earlier[254] that individualism rejects affirmative action from a distrust of collective decision? It may be argued that the earlier claim is defeated because individualism postulates a relatively unstructured state of affairs, untainted by intrusive collective decision, and because this state of affairs is not, in fact, neither natural nor wholly untainted by collective decision.[255] The claim that neutrality and generality presuppose a normative "baseline"[256] does not, however, preclude the further claim that affirmative action is illicit because it is collectively imposed.

The normative baseline for the latter claim is, at its core, distrust of collective decision, just as the normative baseline for the claim in support of affirmative action is an abiding faith in collective decision. Consider the structures of the opposing arguments, pro and con, outlined above. The argument favoring affirmative action, in postulating redistribution as a legitimate objective, presupposes a correct, and centrally mandated, basis for redistribution (one that ignores alternative bases, e.g., to the poor as a class). It also presupposes a capacity to accurately predict the consequences (burden and benefits) of collective decision. It finally presupposes a capacity to meaningfully distinguish between prejudiced and unprejudiced decision (and, therefore, a choice between alternative understandings of the relevant entitlement).

The argument opposing affirmative action implicitly rejects each of these presuppositions. Redistribution is rejected, in keeping with individualist theory generally, either because (1) the correct basis for distribution is unknown[257] or (2) even if a correct basis may be identified, the means necessary to effect the correct result are intolerable[258] or (3)

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[253]*See generally*, T. SOWELL, *supra* note 147.

[254]*See supra* text accompanying notes 231-36.

[255]SUNSTEIN, *supra* note 29, at 896-97.

[256]*Id.*

[257]*See, e.g.*, F. HAYEK, *supra* note 31, at 25-38.

[258]*See* 2 F. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY, 64-84 (1976); R. NOZICK, *supra* note 29, at 160-64, 172-73. Nevertheless, Nozick's historical entitlement theory would permit rectification of wrongs in the acquisition and transfer of holdings. *See id.*, at 152-53, 172-73. However, it is not clear that Nozick's rectification principle would permit redistribution from persons not shown to have themselves wrongfully acquired their holdings. *Cf.* F. HAYEK, *supra*, at 81 (principle of material equality would be justified if deliberate human action was necessary to distribution, which it is not in a free society).

the objective cannot, in fact, be achieved.[259] The argument's claim that only an identifiable few will be burdened or benefitted assumes competence to predict consequences, but is simultaneously pessimistic about consequences. Indeed, its prediction may be predicated upon the supposition that consequences, in keeping with individualism's taste for formalism, cannot be predicted.[260] Although the argument postulates a collective decision regarding entitlement, the entitlement selected is one compatible with a distrust of collective decision; the argument distrusts the governmental discretion inherent in rendering prejudice the basis for the entitlement.[261] Indeed, even the decision to adopt the inalienability of race and gender as an entitlement reflects this distrust. The decision responds to the claim that current distributions of resources and wealth are tainted by a history of race- and gender-based collective decision by conferring only a highly limited authority on government to preclude private allocations that may reflect preferences engendered by that history.

What distinguishes these alternative baselines is, then, not the reliance of individualism upon a problematic claim that existing distributions of resources are "natural" or untainted. Rather, it is a fundamental disagreement about the competence of central authority either to define or to implement the good. It is important to recognize, however, two related caveats: individualism's distrust need not be complete to be coherent and that distrust need not be enshrined as a constitutional mandate precluding debate to be nevertheless real.[262]

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[259]*See, e.g.*, T. SOWELL, *supra* note 147, at 42-60. *Cf.* R. EPSTEIN, *supra* note 247, at 263-82 (effect of economic regulation is often merely wealth transfer, rather than general welfare); Epstein, *supra* note 235, at 272.

[260]By "formalism" is meant rigid adherence to formal and general rules without regard to the social consequences or "realities" of the operation of such rules. The attack of legal realists on formalism was in part an attack upon the pretense of deduction from such rules. However, the attack was also normative in that the realists thought that the operation and effect of rules in actual practice was an important inquiry and that the task of law was to purposively mold law to achieve desirable consequences. *See generally* White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 Sw. L.J. 819 (1986); White, *From Sociological Jurisprudences to Realism: Jurisprudence and Social Change in Early Twentieth Century America*, 58 VA. L. REV. 999 (1972). Individualism's reliance on formalism is therefore compatible with its distaste for governmental assessment of consequences. What was at stake in the realist attack on formalism was not merely a dispute about methodology. It was a dispute about the legitimate capacity of government (including the courts) to act.

[261]It is apparent that substantial fact finding discretion exists in determining whether race or gender was or was not the cause of an employment decision under the disparate treatment theory. *See* Anderson v. City of Bessemer, 470 U.S. 564 (1985). Nevertheless, a concern with prejudiced use of race or gender exacerbates this problem.

[262]In particular, no claim is made here that affirmative action is unconstitutional.

f. Morality and the Incompetence of Government.—Individualism's distrust of the competence of collective decision will seem a hollow complaint to many. Given the reality of race and gender disparities in the distribution of employment and the reality of a history of overt discrimination that at least partially explains these disparities, it is difficult to credit a claim that we are not competent to conclude that this state of affairs is immoral. Individualism's moral relativism and skepticism concerning competence do not, however, compel this claim.

The point of individualism's moral relativism is not that current distributions are moral. Rather, the point is that we cannot decide that the means employed to correct these distributions are justified, given that these means require assessments of individual desert and require the coerced defeat of expectations or entitlements (as these are defined in the individualist universe).[263] Moreover, the point of skepticism about governmental competence is not merely that government should be neutral as between competing conceptions of the moral, but also that government is incompetent to devise an instrumental program to achieve even an agreed upon moral end. It is incompetent both in the sense that centrally designed means to achieve desired end-states do not produce such end-states and that such means intrude upon or deny values deemed crucial within individualist thought. This, indeed, is the thrust of individualist positions in the empirical debate over the question whether affirmative action "works." For the individualist, even one who agrees that it would be better if disparities in the distribution of employment along race and gender lines did not exist, affirmative action will not effectively change the current state of affairs and may well generate unintended and perverse consequences.[264] It is therefore

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See Cox, *"Voluntary" Quotas*, *supra* note 6, at 155-70 (arguing that Congress may constitutionally impose affirmative action in employment). The claims, rather, are that affirmative action is incompatible with the individualism that underlies the disparate treatment prohibition and that individualism's distrust of government plausibly supports that prohibition. Individualism's moral relativism can as easily support a stance of judicial passivity at the constitutional level as a stance of judicial activism in overturning legislation. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[263]*See, e.g.*, T. SOWELL, *supra* note 223, at 19-23, 67-71, 121-33.

[264]Some commentators have taken the view that affirmative action "works." *See, e.g.*, Freeman, *Black Economic Progress after 1964: Who Has Gained and Why?* in STUDIES IN LABOR MARKETS 247 (Rosen ed. 1981) (timing of black economic progress suggests civil rights legislation and affirmative action work); Leonard, *The Effectiveness of Equal Employment Opportunity Law and Affirmative Action Regulation*, 8 RES. IN LAB. ECON., pt. B, 319 (1986) (affirmative action increases proportion of minorities in work forces of contractors subject to federal contract compliance program as compared to employers not so subject). Others take the view that it does not "work." *See, e.g.*, N. GLAZER, *supra* note 6, at 70-76; T. SOWELL, *supra* note 147, at 48-53; BUTLER &

not a viable answer to the individualist skepticism to claim that he defends an immoral distribution; he does not defend the morality of such a distribution.

3. Rejoinder.—The difficulty faced by the individualist critique of affirmative action is that the critique is predicated upon a view of the individual and of the limited competence of government that predates

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HECKMAN, *The Government's Impact on the Labor Status of Black Americans: A Critical Review*, EQUAL RIGHTS AND INDUSTRIAL RELATIONS 235 (1977). *Cf.* Smith & Welch, *Affirmative Action in Labor Markets*, 2 J. LAB. ECON. 269 (1984) (increases in black employment and wages occurred prior to affirmative action); Kellough & Kay, *Affirmative Action in the Federal Bureaucracy*, 6 REV. OF PUB. PERS. ADMIN. 1 (1986) (affirmative action policy in federal employment had no appreciable effect on rate of increase in black employment). For some advocates of affirmative action, evidence of its failure is interpreted as a basis for expanding or intensifying the policy. *See, e.g.*, Huckle, *Whatever Happened to Affirmative Action? Employment of Women in the Los Angeles City Department of Water and Power, 1973-83*, 6 REV. OF PUB. PERS. ADMIN. 44 (1985); Richards, *The Declining Status of Women Revisited*, 19 SOC. FOCUS 315 (1986); Stasz, *Room at the Bottom*, 9 WORKING PAPERS, Jan.-Feb. 1982, at 28.

Disagreements on this question are in part attributable to disputes about empirical methodologies, but are more fundamentally about appropriate criteria for measuring success. In particular, the methodological issues entail (1) the problem of separating the effect of affirmative action in employment from the effects, for example, of improvement in the human capital investment of minorities and women (i.e., of separating effects of demand and supply), (2) the problem of measuring, not gross improvements but, rather, changes in the rate of improvement in relevant time periods, and (3) the problem of identifying relevant proxies for data collection (for example, proxies for the relevant time periods within which affirmative action can be said to be operative and widespread). The problem of appropriate criteria is illustrated by the tendency of advocates of the "affirmative action works" hypothesis to focus upon increases in the proportion of minorities in workforces and of advocates of the "it does not work" hypothesis to focus upon gross measures of minority economic progress (as in wage levels) and to focus upon the question of what subgroups within minority groups benefit from affirmative action.

The critical position is that affirmative action has either no effect or a detrimental effect upon improving the general economic condition of minorities and benefits only those subgroups who possess human capital investments that would enable them to effectively compete under a disparate treatment prohibition. *See, e.g.*, T. SOWELL, *supra* note 147, at 48-53. To the extent that affirmative action is justified on the basis of the moral claim that minority groups should not be consistently found to have a disproportionately smaller share of the economic pie, the relevant inquiry would seem to be whether affirmative action causes this share to increase. Nevertheless, a counterpoint is that, although improvements in human capital investment and growth of the economy are the primary and long-term means of increasing this share, affirmative action does impede declines in the share, at least during periods of general economic downturn. *See* Feinberg, *Are Affirmative Action and Economic Growth Alternative Paths to Racial Equality*? 50 AM. SOC. REV. 561 (1985). For a recent debate on the efficacy of antidiscrimination regulation generally, compare Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987) with Donohue, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523 (1987).

1937.[265] The strong version of the individual contemplated by individualist counterargument, despite rhetorical commitments to him, was rejected by the New Deal and has been repeatedly rejected since the New Deal, on grounds which, to some degree, accept the propositions that both individual attributes are subject to governmental valuation and that collective decision is a legitimate means of allocation and distribution.[266] Indeed, we are so pervasively confronted with governmental denials of the strong version of the individual in contexts not entailing race or gender that it is questionable that the strong version is a generally available construct in American jurisprudence.[267]

The impoverished individual may be the best means by which to reconcile a rhetorical commitment to individualism with post New Deal practice. It is perhaps only the particularly strong emphasis rhetorically placed on "meritocratic" individualism in the race and gender context since 1954 that warrants a claim that there exist expectations consistent with that rhetoric.[268] Apart, however, from the possibility that the impoverished individual is useful for reconciling rhetoric with practice, the fact that we honor the strong individual in the breach subjects reliance upon him in the present context to charges of hypocrisy (or worse).[269]

Nevertheless, there is a potential response to the problem of hypocrisy. If compromise theory is compatible with individualism as

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[265]In 1937, the Supreme Court upheld the National Labor Relations Act of 1935 (codified as 29 U.S.C. § 151 (1982)), thus signaling an end to its resistence to the New Deal. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). It is also arguably the case that the strong form of individualist argument has never, in fact, been consistently adopted in American society. For example, apart from governmental intervention, university admission policies can be described as historically entailing "affirmative action" for white males. *See A Joint Resolution Proposing an Amendment to the Constitution of the United States Relating to Affirmative Action, 1981: Hearings on S.J. Res. 41 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 73-81 (1981) (statement of Martin Kilson).

[266]If evidence is needed for this proposition, it would seem inherent in both the claims of radical scholars that American law is beset by contradiction, and by the claims of libertarian scholars that American law is tainted by paternalism, utilitarianism and statism. *Compare* Kennedy, *Blackstone*, *supra* note 53 (radical position) *and* Kennedy, *Form and Substance*, *supra* note 50 *with* Epstein, Takings, *supra* note 247 (libertarian/utilitarian position). On the effect of the New Deal on American law generally, *see Symposium*, 92 Yale L.J. 1083 (1983).

[267]*See* Mashaw, *supra* note 176. *But cf.* Sunstein, *supra* note 29 (recounting surviving elements of individualism in constitutional law incompatible with post-New Deal thinking).

[268]Brown v. Board of Education, 347 U.S. 483 (1954).

[269]There is nevertheless an unfortunate tendency on the part of some to mistake genuine disagreement with incompatible, but nevertheless legitimate perspectives as evidence of evil. *See, e.g.*, Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327 (1986).

actually practiced (albeit not with individualist rhetoric), there remains the question whether the authoritative texts of law, and particularly in the present context, Title VII, have adopted rhetoric or general practice as the operating principle. At least within the assumptions of a compromise theory of affirmative action, a conclusion that Title VII enacts the strong version of the individual may count as a good reason for an exemption from general, post-New Deal practice. The question of Title VII's operating principle is however postponed until a second justification of group rights theory has been examined.[270]

C. Pragmatic Bureaucratic Justice

The second general justification of affirmative action is that it is inherent in, and perhaps an inevitable consequence of, enforcement of the disparate treatment theory of Title VII liability and is therefore again reconcilable with the individualist model.[271] Unlike the justification from fairness and the social good, this justification does not purport to ignore or devalue "meritocratic" considerations that would control allocation of employment in the absence of affirmative action and, therefore, purports to be a limited governmental intrusion into private allocation. It is recognized that these considerations may be ignored or devalued in individual cases as a consequence or by-product of effective enforcement of a theory intended to preserve them, but it is not part of the rationale that they be ignored or devalued. It should be apparent that Supreme Court doctrine that purports to limit the scope of permissible affirmative action, particularly by preserving employee qualifications requirements, is more compatible with this justification than the social good justification. The social good justification would authorize more direct and less limited versions of affirmative action. Whether the functional consequences of Supreme Court doctrine are compatible with this justification is, as shall be seen, problematic.

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[270] *See infra* text accompanying notes 340-504.

[271] *See, e.g.*, Johnson v. Transportation Agency, 107 S. Ct. 1442, 1462-63 (1987) (O'Connor, J., concurring) (invoking remedial rationale for voluntary affirmative action of correcting past discrimination on part of employer); United Steelworkers v. Weber, 443 U.S. 193, 209-11 (1979) (Blackman, J., concurring) (arguable violation theory of voluntary affirmative action); Fiss, *supra* note 2, at 299-304 (disparate impact as functional disparate treatment); Rutherglenn, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1305-11 (1987) (disparate impact theory is used to identify pretextual disparate treatment). *Cf.* P. Cox, note 12, at ¶ 7.06 (disparate impact theory is both a pretext theory and a theory eliminating criteria that perpetuate historical discrimination); Friedman, *supra* note 6, at 64 (Court's liability theories should be interpreted as prohibiting both overt discrimination and criteria that unfairly preclude access by individuals to employment).

The foundation of this second justification rests upon the claim that it is not possible to maintain a firm distinction between substantive allocation of employment proportionately among race and gender groups on the one hand and a restriction on the process of employment decisionmaking precluding use of race and gender as criteria on the other.[272] If this claim is correct, then the notion earlier advocated, that the disparate treatment theory is a mere process rule, cannot stand.[273]

There are two senses in which the claim may be made. First, the distinction between a governmentally enforced rule of process and a substantive rule of governmental allocation cannot be maintained because an effective rule of process inevitably compels substantive allocation given the limitations of adjudication.[274] If this is so, enforcement of disparate treatment theory inevitably compels affirmative action, meaning that affirmative action is not incompatible with the individualist premises of disparate treatment theory. Second, the distinction between a process of private decision in employment and substantive allocation by private action cannot be maintained either because these are inseparable or because inherent in the notion that race and gender may not be considered, is a requirement that they be considered.[275] If this is so, private internalization of the norms expressed by disparate treatment theory inevitably leads to affirmative action; again there is no incompatibility.

1. Overenforcement and Bureaucracy.—

a. The Argument.—The disparate treatment theory is easily applied where disparate treatment is express. It is applied with difficulty where the presence of disparate treatment must be inferred from circumstances. The difficulty is that a court must determine whether an employment action attributable to a number of potential motives was, in fact, "caused by" race or gender. Not only is the parsing of potential motivating causes an inherently tricky business, but the notion of a race or gender motivation is itself a slippery concept.[276]

Predictably, these difficulties have been "resolved" in the courts by means of redefining them within the procedural apparatus of adjudication. The issue of motive is to be determined as a finding of

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[272]*See generally* Strauss, *supra* note 6.

[273]*See supra*, text accompanying notes 50-54.

[274]*See* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1463 (1987) (O'Connor, J., concurring) (risk of liability under Title VII as justification for "voluntary" affirmative action).

[275]*See generally* Strauss, *supra* note 6.

[276]*See, e.g.*, Schnapper, *Two Categories of Discriminatory Intent*, 17 Harv. C.R.-C.L. L. Rev. 31 (1982); Wasserstrom, *supra* note 6, at 594-603.

fact,[277] and the parties to litigation are assigned burdens of production and persuasion regarding this issue of fact.[278] An allocation of burdens of production and of persuasion is simultaneously an allocation of costs of litigation and risks of judicial error in fact finding. To the extent these costs and risks are assigned to plaintiffs, the disparate treatment prohibition is underenforced.[279] To the extent they are instead assigned to defendants, the prohibition is overenforced.[280] A choice must therefore be made between under- and overenforcement.

One way of characterizing the Supreme Court's Title VII precedents is that the Court has sought both to have and eat its cake on the matter of this choice. Cases entailing individual disparate treatment claims are governed by a choice that underenforces the prohibition.[281] Cases entailing systematic disparate treatment and disparate impact claims are governed by a choice that overenforces the prohibition.[282] The incoherence of Title VII is, therefore, in part attributable to the Court's failure to make a clear choice and adhere to it.

To the extent that the adjudicative apparatus overenforces the disparate treatment theory, there is an inherent functional tendency to compel proportional allocation of employment among race and gender groups. As argued here earlier, such overenforcement alters the incentive structure of employers and renders group based allocations inevitable.[283] Affirmative action is in this sense a "natural" by-product of overenforcement of the disparate treatment theory.

The alternative, underenforcement of the disparate treatment theory, would avoid this result by imposing a heavy burden of proof to establish

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[277]*See* Anderson v. City of Bessemer, 470 U.S. 564 (1985); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

[278]Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[279]It is underenforced both in the obvious sense that an allocation of the risk of nonpersuasion is an allocation of the risk of judicial error in detecting disparate treatment and in the sense that allocations of burdens of production and persuasion is an allocation of costs of litigation. The decision to proceed with litigation is rationally made on the basis of a calculation of the benefit of success discounted by the probability of failure and on the basis of a calculation of costs of litigation whether or not successful.

[280]It is overenforced both in the obvious sense that more conduct will be characterized as entailing disparate treatment than is, in fact, the case (due to allocation of the risk of judicial error) and in the sense that the higher probability of failure in litigation, in combination with the costs of litigation, will generate attempts at finding safe harbors from the threat of litigation, such as a racially balanced workforce.

[281]*See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

[282]*See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971). For an example of the "double whammy" generated by these theories, see Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

[283]*See supra* text accompanying notes 58-78, 113-64.

illicit motivation on plaintiffs. For example, statistical disparities in representation rates could be made an inadequate basis for a plaintiff's *prima facie* case unless all race neutral qualifications requirements are taken into account.[284] The impact theory could be overruled so that neutral requirements would be challengeable only upon a proof of pretextual use of such requirements.[285]

Underenforcement would result if either of two factual assumptions are made. If overt race and gender prejudice remains an extant and pervasive phenomenon, difficulties of proof would limit the capacity of disparate treatment theory to overcome this phenomenon even though the theory is conceptually designed precisely to attack it. Alternatively, difficulties of proof would leave untouched "subtle" forms of racism or sexism. For example, an employer's failure to actively recruit minorities or women, motivated not by overt prejudice but by "selective indifference,"[286] or even by a simple reluctance to incur information costs,[287] would be extremely difficult, if not impossible, to reach under a strict version of the disparate treatment theory. In short, a requirement that plaintiffs prove illicit employer motive would leave much of the practice of disparate treatment untouched. The disparate impact and systematic disparate treatment theories are, therefore, explicable as devices designed to overcome this dilemma.

Supreme Court opinions that appear to invoke group rights theories may be viewed as instances of overenforcement of disparate treatment theory. For example, *Griggs v. Duke Power Co.*,[288] the case in which the Supreme Court adopted disparate impact theory, is widely known for the proposition that employer motive is irrelevant if a race neutral employment criterion has a disparate adverse effect on a protected racial group and is not justified by business necessity. However, *Griggs* is explicable as a case in which the employer utilized education and testing requirements as a pretext for racial exclusion. The difficulties inherent in proof of pretext arguably led the Court to ease the burden on plaintiffs by shifting the burden to employers to establish the absence of pretextual use through the rubric of "business necessity."[289]

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[284]*See, e.g.*, T. SOWELL, *supra* note 147, at 53-56.

[285]*See, e.g.*, Gold, *supra* note 76, at 593-98.

[286]*See* Brest, *supra* note 116, at 14-15, 31-37; Schnapper, *supra* note 276.

[287]The use of race or gender as a proxy for information about potential employees would clearly constitute disparate treatment. A failure, however, to actively seek minority applicants, at least absent evidence of active efforts to recruit majority group applicants, may not.

[288]401 U.S. 424 (1971).

[289]*See* Rutherglenn, *supra* note 271, at 1299-1316. In *Griggs*, the employer had replaced a system of overt disparate treatment with education and testing requirements that had

Privately adopted affirmative action plans may be similarly characterized. At least so long as such plans utilize the rhetoric of "goals" and "timetables" as their operating characteristics, they may be viewed as mere monitoring devices through which employers control the discretion of officials engaged in employee selection.[290] They, therefore, are arguably designed to preclude as well as to "remedy" disparate treatment. Indeed, the remedial rationale, on this understanding, should be understood not as a reference to retrospective relief for past harm but, rather, as a reference to a benchmark for continuous assessment of the risk of disparate treatment.[291] The Supreme Court's tendency to uphold affirmative action plans may be characterized as recognizing this monitoring function.

b. A Counterargument.—There are two crucial aspects of these characterizations: they contemplate a particularized judgment within the circumstances of a single case and this judgment is retrospective in the sense that it concerns the risk of occurrence of disparate treatment on a series of historical occasions (a series of past employment decisions). It is true that this judgment is not as particularized, circumstances-dependent, or historical in form as the judgment required in "finding" illicit motive within a strict application of disparate treatment theory. However, the judgment remains particularized, circumstances-dependent, and historical in the sense that the analytical focus upon group measures of employee selection is a mere device for ensuring sensitivity to the risk of disparate treatment, requiring a careful examination of circumstances to determine whether that risk was realized.[292] Even a monitoring conception of affirmative action displays

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a disparate exclusionary effect on blacks. 401 U.S., at 426-28. Moreover, the requirements in question measured qualities facially irrelevant to the jobs in question. In short, and despite the Court's rhetoric in *Griggs*, the combination of circumstances suggested disparate treatment. In general, the combination of a substantial disparity in effect and facial irrelevancy of the neutral criteria generating this effect raise an inference of pretextual use of the criteria. *See* Washington v. Davis, 426 U.S. 229, 254 (1976) (Stevens, J., concurring).

[290]*See* Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 496 (1986) (O'Connor, J., dissenting in part) (distinguishing goals from quotas); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 289 (1986) (O'Connor, J., concurring) (affirmative action justified if adopted as a remedy for government employer's past discrimination); Johnson v. Transportation Agency, 107 S. Ct. 1442, 1463 (1987) (O'Connor, J., dissenting) (affirmative action justified to remedy work force imbalance which is sufficient to establish a *prima facia* case of systematic disparate treatment).

[291]*See, e.g.*, Jencks, *Affirmative Action for Blacks: Past, Present and Future*, 28 AM. BEHAVIORAL SCIENTIST 731, 753-59 (1985).

[292]This is also arguably true where affirmative action takes the form of a "flexible goal" rather than a "rigid quota." *See Johnson*, 107 S. Ct. at 1447 (gender as "a factor" used as a benchmark to ensure inclusion of women).

these characteristics: failure to achieve a "goal" generates inquiry into the reasons for this failure, arguably for the purpose merely of ensuring that race and gender played no illicit role in producing the failure.

Nevertheless, there is a further dimension to the overenforcement explanation that renders it a problematic means of reconciling individualist values. Overenforcement of the disparate treatment theory occurs within a social context increasingly bureaucratized, both within governmental and private aspects of American culture.[293] The features of this bureaucratization include (1) an emphasis upon purposes or goals, (2) an emphasis upon planning to achieve these goals, (3) an emphasis upon control of bureaucratic activity in service of the goals and, therefore, upon quantified measurement of progress in achieving them, and (4) that the purposes and goals agenda of the organization, at least where the organization is governmental, are rationalized in terms of social welfare and distributional fairness.[294] These features combine to ensure non-particularized bureaucratic judgment intolerant of circumstance and ahistorical in emphasis.[295] A purely bureaucratic activity is inherently antagonistic to individualistic notions of "due

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[293]"Bureaucracy" can be understood to mean (1) a particular institutional arrangement, characterized, for example, by rule-governed behavior, specialized expertise, rational planning, etc.; (2) the general phenomenon of a shift from private to public ordering (or of "reactive" law to "activist" law; *see generally* B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984)); (3) a historical tendency to shift from the model of tripartite government (executive, legislative, judicial) with distinct functions to the administrative state (in which these functions are combined, perhaps through centralization); or (4) some combination of these. For present purposes, the term is used primarily to refer to the second of these possibilities, but all of the first three are elements of the phenomenon.

To this definition must be added the following caveats. First, bureaucratization does not require a wholly centralized administrative state; there can be bureaucracy in senses (1) and (2) even where there are a series of horizontal bureaucratic institutions. Second, bureaucratization does not necessarily imply that bureaucratic behavior is wholly rule governed in a Weberian sense. A central aspect of experience with the American administrative state is bureaucratic discretion, in multiple senses of the term discretion. *See, e.g.*, Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L. J. 1487 (1983); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

Third, bureaucracy is not confined to institutions labeled either administrative agencies or bureaucracies. Indeed, it is possible to so characterize courts, at least in sense (1) and possibly in senses (2) and (3), despite the mediating or limiting role sometimes ascribed to them in administrative law theories. *Cf.* Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L. J. 1442, 1461-63 (1983) (advocating a role for courts that implies a continuous and perhaps centralized exercise of "collective power" over "social life").

[294]*See, e.g.*, Macneil, *supra* note 166, at 903-09.

[295]*See* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1466-68 (1987) (Scalia, J., dissenting) (flexible goal in fact operates as rigid quota); Mashaw, *supra* note 176, at 1150-59.

process'' because such notions assume both a need for individuated judgment about particular circumstances and the premise that individual rights are at stake. Bureaucracy assumes, instead, a need for rules in service, not of individual rights, but of the policy or welfare objectives of the bureaucratic organization.[296] This is the reason that the essentially individualist character of American political rhetoric has produced due process obstacles to bureaucratic activity and a resulting tension between the mores of process and a bureaucratic culture.[297] It is also the reason that bureaucratic organizations are justified, not in terms of a need to correct past wrongs, but as mechanisms for achieving particular desired end-states.[298]

The bureaucratic environment in which overenforcement operates is not merely governmentally bureaucratic; it is ''privately'' bureaucratic as well.[299] Employers subjected to overenforcement theories of liability are not typically sole proprietors; they are complex bureaucracies, often in corporate form, that share the general features of governmental bureaucracy and are highly interconnected with formal governmental bureaucracy. The consequence is that overenforcement of disparate treatment theory encounters and is transformed by bureaucratic dynamics. In particular, particularized and circumstance-dependent judg-

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[296]The tension between the perception of a need for individuated judgment on the one hand and the perception of a need for general categorization responsive to bureaucratic objectives on the other is illustrated by irrebutable presumption doctrines. *Compare* United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973) (irrebutable presumption impermissible) *with* Weinberger v. Salfi, 422 U.S. 749 (1975) (irrebutable presumption permissible). The argument that ''rights'' in an administrative state are not individual, but are instead responsive to the needs of bureaucratic organization and its policy agenda is made by Professor Mashaw. *See* Mashaw, *supra* note 176.

These tensions are evident in individualist theory as well. On one hand, individualists favor general and relatively certain rules; on the other, they exhibit a distaste for governmental categorizations of persons that fail to account for the distinctness of persons and circumstances. The tension in individualism is perhaps partially resolved by noting that the general rules favored by individualists are of a certain character—those subject to characterization as rules of process and those expressive of a regime of corrective justice. *See supra* text accompanying notes 49-54. The difficulty with the general rules yielded by bureaucracy in an administrative state, from this perspective, is that they are often designed to effect an agenda of distributive justice. *See* Mashaw, *supra* note 176, at 1153-59.

The tensions are also reflected in critical perspectives by the assertions that bureaucracy is caught between claims that it must be both objective and subjective and that no plausible distinction between objectivity and subjectivity may be maintained. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1286-92 (1984).

[297]Macneil, *supra* note 166, at 909-13.

[298]*See, e.g.*, B. SCHWARTZ, ADMINISTRATIVE LAW 9-10 (2d ed. 1984) (justifying legislative powers of agencies).

[299]Macneil, *supra* note 166, at 904.

ment is displaced by a bureaucratic dynamic that measures success in terms of simplistic, objective and quantifiable criteria.

The most clear cut illustration of this phenomenon, and of the distinction between particularized and non-particularized versions of overenforcement theory, is the debate over characterization of affirmative action as entailing "quotas" or "goals and timetables."[300] A "strict quota" is said to be a mandatory requirement that a particular minority representation rate be achieved. A "goal" is said to be a mere benchmark for measuring progress in achieving such a representation rate, requiring merely "good faith efforts."[301] The "goal" understanding assumes particularized and circumstance-dependent judgments both within the bureaucratic organization seeking achievement of the "goal" in its employee selection decisions and within the bureaucratic organization reviewing compliance with the "good faith effort" test. A "quota" understanding assumes a requirement that the bureaucratic organization subject to it achieve quantifiable objectives through control of its selection decisions without regard to circumstance.

To the extent that organizations subject to a "goals" understanding and organizations charged with enforcing a "goals" understanding are characterized by the noted bureaucratic dynamic, there is an inevitable tendency for the "goals" understanding to become, functionally, a quota understanding, despite the dominant rhetoric of "goals" and "good faith effort."[302] The debate over proper characterization is more than semantic, it reflects the tension between rhetoric and the bureaucratic dynamic that implements this rhetoric.

The courts are not immune from the phenomenon of bureaucratization. Overenforcement theory itself illustrates this point, as it is in a sense designed to more efficiently achieve the objective of prohibiting

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[300]The debate has been most intense in the context of the enforcement program under Executive Order 11246. The regulations implementing that order purport to adopt a goals and timetables position. 41 C.F.R. § 60-2.12 (1987). However, the debate has also occurred in the Title VII context. *Compare* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1455 (1987) (majority opinion) *with id.* at 1466-68 (Scalia, J., dissenting).

[301]*See* Legal Aid Soc. v. Brennan, 608 F.2d 1319, 1343 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

[302]For example, the Office of Federal Contract Compliance Programs once adopted an enforcement strategy in its field operations that invoked a quota system while simultaneously maintaining the rhetoric of goals and timetables in its regulations. *See* Firestone Synthetic Rubber & Latex Co. v. Marshall, 507 F. Supp. 1330 (E.D. Tex. 1981). This practice has been formally stopped, OFCCP Order No. 660a(2) (March 1, 1983), but it is not clear whether it has been stopped in practice. The "quota" perception of some industries subject to the practice is recounted in *Hearing on Affirmative Action and Federal Contract Compliance Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong. 1st Sess. 151-217 (Nov. 7, 1985).

disparate treatment by reducing proof costs through overinclusive coverage. If disparate impact theory was originally intended merely as a means of identifying disparate treatment, then disparate effect and absence of business necessity could be characterized as mere means of inferring illicit motive while requiring particularized judgments under the circumstances of individual cases. Nevertheless, the tendency of both private bureaucracies subjected to judicial inquiry within this analysis and the judicial bureaucracies engaged in the analysis has been to become impatient with it. Although "business necessity" is a potentially open-ended and fact-dependent standard, it has taken the form, under administrative agency guidelines and under some judicial decisions, of expert analysis, largely dependent upon measures of statistical correlation, of the relevance of job criteria to job performance, a development in keeping with expertise as a rationale for bureaucratic decisionmaking.[303] The inherent difficulty of gathering adequate data to account for racial disparities in representation rates has meant that allocation of the burden of production of evidence is outcome-determinative and therefore a means of avoiding particularized judgment.[304]

Both disparate impact and systematic disparate treatment theories are systematic and prospective in focus and effect; they are as much means of administering employment systems through a prospective threat of liability as means of making after-the-fact judgments about particular conduct on particular occasions. Moreover, even where Title VII doctrines are applied by courts in a particularized fashion, they yield functionally rigid rules when confronted by private and public bureaucracies subjected to them. As particularized judicial judgment is not predictable *ex ante*,[305] and as bureaucratic organizations prefer predictability to uncertainty in the norms governing their behavior, implicit functional rules and safe harbors from exposure to liability will be sought in the interstices of Title VII doctrine. The Supreme Court has, in effect, supplied these rules and safe harbors in its voluntary affirmative action cases.[306]

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[303]*See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607 (1987). *But see* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); Washington v. Davis, 426 U.S. 229 (1976).

[304]*Compare* Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983) (plaintiff must account for qualifications) *with* Davis v. Califano, 613 F.2d 957, 964 (D.C. Cir. 1979) (plaintiff need account only for minimum qualifications). *Cf.* Bazemore v. Friday, 106 S. Ct. 3000 (1986) (regression equation containing fewer than all relevant variables can establish a prima facie case).

[305]*See* Johnson v. Transportation Agency, 107 S. Ct. at 1466-69 (Scalia, J., dissenting) (flexible goal characterized as in fact a rigid quota).

[306]*See supra* text accompanying notes 134-48.

In short, the juxtaposition of an overenforcement explanation with bureaucratic dynamic threatens the overenforcement explanation. Even if voluntary affirmative action is a mere by-product of effective enforcement of the disparate treatment prohibition, it is also a rational bureaucratic response to that enforcement. It permits construction of an identifiable, objective goal (proportional representation), planning to achieve that goal, and control of employee selection through objective measurement of progress in achieving the goal. But the bureaucratization of overenforcement thus transforms the very character of overenforcement. It permits the conclusion that overenforcement of disparate treatment theory has become a group rights theory, despite the individualist rhetoric that may be invoked to justify it. Indeed, given a policy of overenforcement and the bureaucratic character of current social organization, a functional group rights theory would appear to be inevitable.

If this understanding of the adjudicative process through which Title VII has been implemented is correct, it may nevertheless be argued that the individualist and group rights models are reconcilable because the sharp conceptual distinction between them is inoperative in practice. At least so long as overenforcement is deemed necessary as a strategy of social control and social organization is characterized by bureaucratic dynamic, the individualist model flows into the group rights model—the models are operationally indistinct. Any given case, and any given instance of judicial analysis of a case, is merely an application of one or the other model.

There is, however, a sense in which this reconciliation is implausible; it assumes the necessity of an active and intensive governmental role in enforcing disparate treatment theory and sacrifices the basic individualist distrust of centralized collective decision for the individualist conclusion that race and gender should be inalienable.[307] To the extent that individualist distrust is thought primary and its conclusion secondary, an overenforcement rationale is no reconciliation.

Even if the necessity of overenforcement is conceded, it is not necessarily the case that the individualist and group rights alternatives are so wholly indistinct in practice that no meaningful conceptual distinction can be made between them. Moreover, it remains possible that the conceptual distinctions between the models will influence judicial decision at the margin and that the body of judicial precedent can be viably placed at a point in the functional spectrum lying between the conceptual models. This, indeed, will be the ultimate point of the next subsection of this article: despite the bureaucratic dynamics of

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[307] *See supra* text accompanying notes 231-36.

overenforcement, there remain important distinctions between the individualist and group rights models that produce real world differences in consequences.

For present purposes, the claim that conceptual distinction may be meaningfully made is illustrated by attempting to refute an argument from the equivalence of overt discrimination and discriminatory effect. The argument proceeds as follows: (1) overt race and gender classifications are suspect because of the risks that are created from prejudice;[308] (2) race and gender neutral criteria that have disproportionate race or gender effects are also suspect because they, too, may have been adopted from prejudice;[309] (3) indeed, the risk of prejudice is a function of the (foreseeable) effects of a measure, not of its explicit language[310] because, if decisionmakers are prejudiced they will be concerned with effects, not with the language of the classification that produces these effects;[311] (4) because the primary concern is with effects of classifications due to the risk of prejudice, there is no clear distinction between disparate treatment theory and affirmative action—both are concerned with the same problem.[312]

One difficulty with this argument is its assumption that concern with prejudice, narrowly defined, exhausts the meaning and scope of the disparate treatment prohibition.[313] Nevertheless, let that assumption be entertained. Notice that the argument nicely tracks bureaucratic dynamic; effects are observable and, therefore, directly and rationally treatable phenomena from a bureaucratic perspective. The argument also is a variation on the general theme that process of decision and substantive allocation are indistinguishable; the risk of prejudice is collapsed into a concern for effects. Nevertheless, there is a fatal flaw in the argument in its step (3) that invalidates its conclusion at step (4).

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[308]Strauss, *supra* note 6, at 118-21.

[309]*Id.* at 121.

[310]*Id.*

[311]*Id.*

[312]*Id.* at 122-26. To some extent, this argument appears to rely on the notion of selective indifference: if a decision maker undervalues minority interests in adopting a race-neutral criterion, and if we are concerned about this valuation, we are concerned with its effects. *Id.* at 123-24. We are concerned, however, with effects only if we postulate some criterion of proper valuation and seek to measure effects against this criterion. We can instead be concerned with illicit motive, so that the problem of selective indifference is not undervaluation but, rather, the *selectivity* of valuation. In the latter case, we are concerned with effects as evidence of selectivity, not with effects as such. The difficulty is in assessing the strength of the inference of selectivity from disparate effects, but this does not establish, except by reference to a bureaucratic ethic, the primacy of effects.

[313]*See supra* text accompanying notes 231-36.

While it is certainly the case that a decisionmaker may adopt a neutral classification for the purpose of generating adverse effects on a given race or gender group (either in the sense that he desires to bring about harm or is selectively indifferent to the harm generated) and that decisionmakers are generally concerned with bringing about their desired effects from the language they employ, it is not true that our concern with prejudice is a concern with effects. If we are concerned about prejudice, our concern with effects is derivative; it is a concern with evidence of prejudice. This is of course not to say that the distinction between a concern with prejudice and a concern with effects is not difficult to maintain where the evidentiary weight assigned effects is substantial, but this difficulty does not establish the absence of a conceptual distinction or the proposition that the conceptual distinctions will not influence judicial decision.[314] Still less does it reconcile affirmative action and individualist ideals. Indeed, if individualist ideals are taken as primary, it suggests instead that the evidentiary weight assigned effects is problematic.

2. Process Rules and Substantive Allocation Rules.—

a. The Argument.—At an earlier point in this article it was claimed that the disparate treatment theory is a rule of process and group rights theories are rules of substantive allocation.[315] A disparate treatment theory is a rule of process in the sense that it precludes consideration of race or gender status in a private exchange, but does not purport otherwise to compel allocation of an employment opportunity through that exchange. There is of course a sense in which this characterization is clearly false: the disparate treatment theory is neither value free nor a mere means or structure for facilitating private exchange. Indeed, the theory precludes some forms of private exchange on the basis of a collectively determined morality; race and gender are rendered inalienable by it.[316]

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[314]Indeed, the conceptual distinction between motive and effect clearly does make a difference. *See* Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979).

[315]*See supra* text accompanying notes 50-54.

[316]*See supra* text accompanying notes 33-35. This may be true of all purportedly value neutral process rules. *See, e.g.*, Kennedy, *Form and Substance*, *supra* note 50. For example, paradigmatic process rules, contract doctrines, are expressions of substantive societal values. *See generally* I. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980). The presence of the sovereign both as an enforcer and intervenor in the process of private exchange alters allocation. Moreover, the process rules of contract may be so subject to distinct conceptualizations, founded on distinct systems of values, that their meaning becomes largely a function of the conceptual system of the person manipulating them. *See* Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983).

There is a further sense in which the distinction may be challenged. It is possible to claim that the process by which an employer makes an allocation of employment is inseparable from the allocation itself. If process and allocation are inseparable, an affirmative action constraint on allocation may be so like a disparate treatment constraint on process that the individualist model need not be reconciled with the group rights model—they are themselves inseparable.

The premise of this argument is that race and gender have a unique and peculiar status under the disparate treatment theory similar to their unique and peculiar status under group rights theories. Prohibiting only consideration of race or gender, and not consideration of other and different aspects of persons, focuses attention on race and gender.[317] Disparate treatment theory renders race and gender visible even while purporting to enforce a race and gender blindness ideal. Consider the decisionmaking process of an employer choosing among applicants for a scarce employment opportunity. It is unlikely that the employer would take eye color into account in selecting between applicants of relatively equal qualifications because there is no social practice or legal compulsion that would make such a basis for decision plausible.[318] There is, however, a legal compulsion that the employer not take race or gender into account where the disparate treatment theory is operative. That prohibition emphasizes race and gender status even for an unprejudiced employer, an employer who would not otherwise view race or gender as plausible bases for decision. The employer, aware of this emphasis, must necessarily ask himself, if he is acting in compliance with the prohibition, whether his inclinations in the matter of employee selection are tainted by race or gender.

This tendency of the disparate treatment theory to force self-examination is exacerbated by governmental overenforcement of the theory. The employer is necessarily aware of the fact that the allocation he makes is evidence. If we add to this mix the fact of our collective historical experience with race and gender, an experience shared by the employer, it seems clear that race and gender will be considered in the process of decision *precisely because* it is not supposed to be considered. This is not merely a temptation; it is inherent in the decisionmaking process of the employer acting in good faith where we attribute either a reasonable degree of introspection or a rational calculation regarding the risk of liability to that employer.

In short, the distinction between process of decision and allocation of employment breaks down, at least at the margin, where differences

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[317]*See* Strauss, *supra* note 6, at 100-13; Wasserstrom, *supra* note 6, at 586-87.

[318]Wasserstrom, *supra* note 6, at 586-87.

between visible employee qualifications are minimal or unimportant. Affirmative action "goals" in allocation of employment are inherently a part of the process of decision even where informally and unconsciously formulated.[319]

b. A Counterargument.—Nevertheless, there is a question about just how far this explanation of an employer's decisionmaking process may be pushed. It is a plausible explanation of that process where allocation decisions at the margin are assumed; it is not plausible if unequal qualifications are assumed. Race and gender, absent a governmentally enforced group rights theory, need not be considered by an employer where a candidate's seniority, education or work experience are superior.[320] *Johnson v. Transportation Agency,*[321] can be viewed as consistent with this distinction. Its emphasis on employee qualifications suggests that the Court recognized the inevitability of affirmative action at the margin but was unprepared to authorize it where qualifications are unequal.[322] If some set of minimum qualifications could be identified and predictably utilized without threat of liability, the form of affirmative action validated in *Johnson* would resemble the form implicated by introspection and rational calculation.

The obvious difficulty with this interpretation is that *Johnson* cannot be properly viewed in isolation. As qualification requirements are subjected to theories of liability that compel their assessment in terms of allocation of employment among race and gender groups, it cannot be said that *Johnson's* authorization is limited to the margin.[323] What renders race and gender visible in contexts in which employee qualifications are unequal is a governmental policy of forced devaluation of qualifications. Moreover, an "at the margin" interpretation of *Johnson*, when *Johnson* is read in conjunction with other of the Supreme Court's affirmative action precedent, is problematic because the interpretation best characterizes only the position of some of the Justices, most particularly that of Justice O'Connor.[324]

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[319]*Cf.* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1463 (1987) (O'Connor, J., concurring) (use of gender as a factor is prospective means of ensuring non-discriminatory selection). *But cf.* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 378-79 (1978) (Brennan, J., dissenting) (arguing that formal quota and use of race as an additional factor in decisionmaking are constitutionally indistinguishable).

[320]*Cf.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring) (objective employment criteria are a means of precluding disparate treatment).

[321]107 S. Ct. 1442 (1987).

[322]*See supra* text accompanying notes 134-48.

[323]*See supra* text accompanying notes 149-53.

[324]*See, e.g., Johnson*, 107 S. Ct. at 1462-63 (O'Connor, J., concurring); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 489-99 (1986) (O'Connor, J., concurring and dissenting); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 289-93 (1986) (O'Connor, J., concurring in part).

According to these Justices, affirmative action is not justified as a means of remedying "societal discrimination" and is not justified merely as a means of ensuring proportional representation of minorities or women.[325] It is justified, instead, by overenforcement theory and bureaucratic dynamic. In particular, it is justified by past discrimination on the part of the employer adopting or subjected to an affirmative action plan[326] and as a flexible goal designed as a monitoring mechanism to ensure that such discrimination is not repeated.[327] Other Justices are quite straight-forward in accepting a quite distinct rationale. Affirmative action, for them, is justified by societal discrimination or by the objective of proportional allocation so long as the particular plan in issue permits a proportional share for whites and males as well.[328] The fact that these rationales are distinct and yield different votes in marginal cases[329] is evidence that there is a viable conceptual distinction between a process of employment decision theory of antidiscrimination policy and a substantive allocation theory of antidiscrimination policy.[330] The fact that the rationales are often combined to produce working majorities favoring affirmative action is evidence that the former very often flows into the latter—that sharp conceptual distinctions between the two break down in practice.[331]

There is a further and more fundamental difficulty with any claim that the Court's doctrines constitute a mere recognition of the inevitable dynamics of disparate treatment theory and are therefore compatible with the individualist model. It is the difficulty of the Kuhnian paradigm shift.[332] The premise of a paradigm shift is that rhetoric matters: the structure of thought and value through which we perceive the "reality" of our world defines the content of that reality because there are no "facts," untainted by the structure of perception, capable of ascertainment. The rhetoric of a process conception of the antidiscrimination principle may be viewed as such a structure of thought and value, a

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[325]*See Wygant*, 476 U.S. at 274-76 (Burger, C.J., Powell and Rehnquist, J.J.); *id.* at 288 (O'Connor, J., concurring in part); *Johnson*, 107 S. Ct. at 1462-63 (O'Connor, J., concurring in judgment).

[326]*See Wygant*, 476 U.S. at 274 (Burger, C.J., Powell & Rehnquist, J.J.); *id.* at 289 (O'Connor, J. concurring in part).

[327]*See id.* at 290 (O'Connor, J., concurring in part); *Local 28*, 478 U.S. at 495-96 (O'Connor, J., concurring and dissenting).

[328]*See Wygant*, 476 U.S. at 309-10 (Brennan, Marshall & Blackmun, J.J., dissenting); *id.* at 316-17 (Stevens, J., dissenting); *Johnson*, 107 S. Ct. at 1456-57 (Brennan, Marshall, Blackmun, Powell & Stevens, J.J.); *id.* at 1458-60 (Stevens, J., concurring).

[329]*See, e.g., Local 28*, 478 U.S. at 421; *Wygant*, 476 U.S. at 427.

[330]*See supra* text accompanying notes 307-14.

[331]*See supra* text accompanying notes 292-312.

[332]*See generally* T. Kuhn, *supra* note 29.

Kuhnian paradigm. So, too, may the rhetoric of a substantive distribution (equal effects or results) conception of that principle. The judicial rhetoric of compromise reconciles these conceptions, as by emphasizing employee qualifications as a constraint upon affirmative action. Judicial rhetoric nevertheless both generates, functionally, a group right to proportional distribution and expressly recognizes and condones race and gender preferences. Both the datum of the functional group right and the express condonation fundamentally undermine the process paradigm; it no longer works as a plausible structure for modeling and, therefore, for perceiving legal "reality."

An example may clarify this point. Recall that disparities in the substantive distribution of employment among race and gender groups is evidence of disparate treatment under an overenforcement version of disparate treatment theory, the "systematic" discrimination theory.[333] As a conceptual matter, the characterization of a disparity between the black representation rate in a labor pool and the black representation rate in a workforce as mere evidence is compatible with the process paradigm because the employer is free to explain the disparity as attributable to a factor, such as employee qualifications, not accounted for in calculating the disparity.[334] This compatibility hypothesis is, however, undermined if it is recognized both that the employer's explanation is subject to judicial assessment under criteria of relevance and necessity and that the employer may escape this assessment through a conscious effort to eliminate the disparity.[335] The process paradigm no longer quite fits as a description of the phenomenon of systematic discrimination litigation. The *rationale* for the theory of liability fits the process paradigm because an overenforcement strategy is instrumentally compatible with that paradigm, but the functional implications of the theory fit a substantive distribution paradigm.[336]

Nevertheless, the paradigm from which decisionmakers perceive such litigation strongly influences, perhaps compels, its functional implications. If the decisionmaker has internalized the rhetoric of the process paradigm, emphasis will be placed on the notion that a disparity is "mere evidence," and assessment of an employer's explanation of the disparity will be in terms of the credibility of that explanation.[337] If

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[333]*See supra* text accompanying notes 73-76.

[334]*See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

[335]*See supra* text accompanying notes 71-78.

[336]This is the reason that justices with quite distinct rationales for affirmative action very often combine to form Supreme Court majorities upholding it. *See* Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

[337]*See* Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*,

the decisionmaker has instead internalized the rhetoric of the distribution paradigm, the notion of discrimination and disparity will be equated and an employer's explanation of the disparity will be in terms of whether it is truly "necessary."[338] In short, the paradigm influences both the results reached and the long-term function of the theory of liability.

What the Supreme Court's affirmative action decisions add to this mix is express recognition that race and gender based distribution is permissible. Even if this permission is explicable as an acknowledgment of the tendencies of overenforcement or of the inevitability of consideration of race and gender, it implicates the distribution paradigm. The effect is that the normative perspectives of the judges who administer the law of employment discrimination and of the participants in the employment process whose incentives are molded by that law are influenced in the direction of the distribution paradigm. If it is correct that the Court's conclusion produces a partial paradigm shift, the new paradigm, a distribution paradigm, matters. It generates the shifts in emphasis and character of analysis that change results in cases and in long-term function. In particular, it moves a bureaucratic overenforcement rationale for Title VII doctrine in the direction of policy of redistribution of employment among groups. The pragmatic bureaucratic justice justification of affirmative action tends to collapse into the social welfare justification of affirmative action.[339]

D. Summary

This section has postulated three versions of group rights theory: communitarian theory, distributive equality theory and compromise theory. It has claimed that Supreme Court rhetoric best fits compromise theory. As compromise theory purports to reconcile individualist ideals with a policy of group based allocation of employment, the section explored two lines of justification for group based allocation with a view to questioning this reconciliation. The justifications examined were,

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455 U.S. 1021 (1982); Gillespie v. Wisconsin, 771 F.2d 1035 (7th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986).

[338]*See* Gilbert v. City of Little Rock, 799 F.2d 1210 (8th Cir. 1986); Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981).

[339]*Cf.* Mashaw, *supra* note 176 (treating rights in the administrative state as "statist" in the sense that they are dependent upon governmental definition of public welfare and the dynamics of the administrative apparatus); Rabin, *Legitimacy, Discretion, and the Concept of Rights*, 92 YALE L. J. 1174 (1983) (traditional notion of individual rights has in effect been abandoned in favor of an administrative process for reconciling collective interests).

first, that social welfare requires affirmative action and no individual right is defeated by that requirement and, second, that affirmative action is implicit in enforcement of the individualist conception of the antidiscrimination principle.

Seven conclusions have been reached: (1) the social welfare justification can be reconciled with the individualist ideal only by rendering the ideal meaningless. (2) Nevertheless, the individualist ideal, although real as a matter of rhetorical commitment, may plausibly be described as empty as a matter of actual practice. Adherence to the individualist ideal in the context of race and gender requires justification. (3) Such a justification may be found in Title VII if Title VII can be said to authoritatively adopt the individualist ideal. (4) Overenforcement of disparate treatment theory and the bureaucratic environment within which enforcement operates tend to compel affirmative action, so a compromise version of group rights may be explained as an inevitable or natural byproduct of enforcing the individualist ideal. Nevertheless, there are important conceptual distinctions between disparate treatment, disparate impact and affirmative action that generate meaningful differences in the understanding of antidiscrimination law adopted by enforcement authorities. (5) Race and gender consciousness is implicit in the disparate treatment prohibition and this consciousness renders affirmative action implicit in the prohibition at the margin. However, this implication is confined to marginal cases; it is compelled generally only where group rights theory is authoritatively adopted as general principle. (6) If race or gender imbalance, as such, is authoritatively viewed as a justification for remedial measures, the adoption of such a view itself restructures thought and action. A bureaucratic overenforcement rationale then tends to collapse into a redistribution of employment for purposes of social welfare rationale. (7) As the Supreme Court's most recent pronouncements treat imbalance as a justification for affirmative action, the Court may have adopted a fair distribution of employment, rather than process or bureaucratic overenforcement paradigm for its version of Title VII.

IV. The Statute and Its Interpretation

The Supreme Court has consistently proclaimed that both the disparate impact theory and its treatment of affirmative action are compelled or at least compatible, with Title VII.[340] The implication of these proclamations is, then, that a compromise theory of group rights is

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[340] *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

supported by the statute. A number of commentators have so argued.[341]

Neither the proclamation nor the implication are supportable by reference to traditional theories of statutory interpretation. This, of course, is a bold claim. Paradoxically, it is a claim supportable by reference both to the concessions of some commentators who advocate group rights theories[342] and to the concessions of five Justices of the Supreme Court, three of whom nevertheless support the Court's interpretation.[343] Indeed, it appears generally conceded that neither the language of Title VII nor the understanding of the Congress that enacted it would support an overt governmental policy of compelling a redistribution of employment to ensure proportion among race and gender groups.[344] If the analysis of this article is correct, there is nevertheless a group rights regime in place promulgated on the authority of the statute. Although this version may be explained in terms of bureaucratic overenforcement of disparate treatment theory, the Supreme Court's most recent affirmative action decisions have moved the doctrine in the direction of proportional distribution of employment among race and gender groups. If this state of affairs is to be explained, it must

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[341]*See, e.g.*, Blumrosen, *supra* note 160.

[342]*See, e.g.*, Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After* Brown v. Board of Education, 41 U. CHI. L. REV. 742, 765-66 (1974); Fallon & Weiler, *supra* note 6, at 14-18.

[343]Of the Justices who served on the Court at the time of the *Weber* decision, the *Johnson* decision or both, four (Burger, C.J., Rehnquist, White & Scalia, J.J.) took the position that Title VII prohibits race and gender preferences. Two Justices (Brennan & Marshall, J.J.) consistently argued that Title VII permits such preferences. Two Justices (Powell & O'Connor, J.J.) have voted to uphold affirmative action plans, but the extent to which they adhere to the position that such plans are compatible with the legislation is unclear. One of these two (O'Connor, J.) has at least hinted that she does not believe the plans to be compatible with original congressional intent. Johnson v. Transportation Agency, 107 S. Ct. 1442, 1460-61 (1987). Two Justices (Stevens & Blackman, J.J.) have conceded that voluntary affirmative action is incompatible with the statute as Congress conceived it, but have voted to uphold preferences on the basis either of stare decisis or "equity." *Johnson*, 107 S. Ct. at 1457-60 (Stevens, J., concurring). *Weber*, 443 U.S. at 209-16 (Blackmun, J., concurring). By this count, then, five of the nine Justices who sat on the Court when *Johnson* was decided (Rehnquist, White, Blackmun, Stevens & Scalia, J.J.) have at least on occasion agreed that voluntary affirmative action is inconsistent with original legislative intent.

[344]This is so because the Court continues to adhere to the fiction that "voluntary" affirmative action is not "required." However, the Justices are not consistent on the question, either collectively or individually. For example, the majority in Connecticut v. Teal, 457 U.S. 440 (1982) rejected a group rights explanation of disparate impact theory. That majority was composed of Justices who have voted to uphold affirmative action plans. The dissenters in *Teal* came rather close to explaining impact theory as a group rights theory, but some of the dissenters have consistently rejected the legitimacy of voluntary affirmative action.

be by reference to a theory of interpretation and, therefore, of judicial function that treats neither language nor legislative understanding as controlling.

A. The Statute and the Understanding of the Congress that Enacted It

The chief prohibitory provision of Title VII that is applicable to employers provides:

> (a) It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[345]

On its face, this provision precludes (1) overt use of race or gender as an employment criterion and (2) pretextual use of race and gender neutral criteria to intentionally discriminate. It is plausible to read the second subdivision as concerned with effects, but its reference is to effects on individuals. Moreover, both provisions rest on the phrase "because of race, color, religion, sex, or national origin," and therefore invoke a causal conception of discrimination in keeping with the disparate treatment theory.[346] This facial emphasis on intentional discrim-

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[345]42 U.S.C. § 2000e-2(a) (1982).

[346]*See* P. Cox, *supra* note 12, at 6-9 to 6-13. The causal understanding is central to the disparate treatment theory because the narrow issue under that theory is whether, e.g., race or some factor independent of race explains the defendant's decision. The causal understanding is to be distinguished from a correlation understanding. Under the correlation understanding, some factor facially independent of e.g., race (such as possession or nonpossession of a high school diploma) explains the employer's decision, but this independent factor is related to race in the sense that there is a disparity among groups with respect to possession of the independent factor. This disparity may be attributable to disparate treatment, but, unless that disparate treatment is traceable to the employer (or the employer utilizes the independent factor pretextually), the employer has not engaged in disparate treatment.

A dilemma posed by the causal understanding is whether selective indifference should count as a cause of an employment decision. *See, e.g.*, Schnapper, *supra* note 276, at 41-44. Arguably, it should, but there are substantial difficulties presented in proof of selective indifference. If the burden were allocated to a plaintiff, the plaintiff would have

ination is reinforced by other provisions of the Act. For example, Section 703(h) provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the result is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.[347]

On its face, this provision both exempts qualifications criteria independent of race and gender from judicial evaluation and precludes only the pretextual use of race and gender neutral criteria.[348] Indeed, it is a virtual restatement of the individualist position that governmental authority is to extend only to the narrow prohibition of disparate treatment.

Finally, Section 703(j) of the Act specifically addresses the possibility that the Act might be interpreted to recognize a group right to proportional allocation of employment by banning such an interpretation:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may

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to establish that an employer would not have relied upon a race-neutral factor correlated with race if the correlation adversely affects the employer's favored racial group. If the burden of disproving selective indifference is imposed upon the defendant, as by treating disparities generated by a neutral criterion as prima facie evidence of selective indifference, the functional result is likely to be a prohibition of disparities, not a prohibition of selective indifference. For a good statement of the causal understanding of the disparate treatment theory that nevertheless pays inadequate attention to the latter point, see Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733 (1987).

[347]42 U.S.C. § 2000e-2(h) (1982).

[348]Rutherglenn, *supra* note 271, at 1302-12 (1987) (treating section 703(h) as adopting a pretext theory of discrimination, but approving of *Griggs* when construed as recognizing a pretext theory).

> exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.[349]

The 1964 legislative history of the Act further reinforces these facial appearances. That history is replete with the appeals of sponsors and supporters of the legislation to the individualist ideal.[350] It is replete,

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[349]42 U.S.C. § 2000e-2(j) (1982).

[350]For example, the Interpretive Memorandum of Senators Clark and Case on the House Bill states:

> There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against.
>
> There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicnats have these qualifications, and he may hire, assign, and promote on the basis of test performance.
>
> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

110 CONG. REC. 7213 (1964). Senator Humphrey, the principal author of the compromise bill eventually enacted argued:

> Nothing in the bill or in the amendments requires racial quotas. The bill does not provide that people shall be hired on the basis of being Polish or Scandinavian, or German, or Negro, or members of a particular religious faith. It provides that employers shall seek and recruit employees on the basis of their talents, their merit, and their qualifications for the job.
>
> The employer will outline the qualifications to be met for the job. The employer, not the Government will establish the standards. This is an equal employment opportunity provision.

110 CONG. REC. 13,088 (1964).

as well, with (1) the claims of opponents of the legislation that it would be interpreted to recognize group rights, (2) the denials of sponsors and supporters of these claims and (3) amendments to the legislation, chiefly in the form of Section 703(j), designed to ensure that no such interpretation would be attempted.[351] This is not to say, of course, that the Congressmen who sponsored or advocated the legislation were radical individualists who generally subscribed to the individualist model. They were not. It is to say, instead, that the rationale for the legislation—the principle of political morality that was employed as the reason for and content of the legislation—was individualist, quite probably because an appeal to that principle was thought to render the legislation passable given the political climate of the times.[352] Finally, however, the legislative record also clearly discloses that the Congressional objective was to improve the economic lot of minorities and women, and perhaps primarily, to ensure full economic participation for blacks.[353] It was thought, possibly erroneously, that the disparate treatment prohibition would achieve this end.[354]

B. The Supreme Court's Interpretation and the 1972 Amendments

The first of the Supreme Court's steps down the road to a compromise theory of group rights came in *Griggs v. Duke Power Co.*,[355] where the Court formally rejected the claim that Title VII prohibits only intentional discrimination and adopted the disparate impact theory. As has been previously argued here, *Griggs* is subject to an interpretation

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[351]*See* the legislative history recounted in Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 452-65 (1986) and United Steelworkers v. Weber, 443 U.S. 193, 231-53 (1979) (Rehnquist, J., dissenting).

[352]It is apparent, for example, that Senator Humphrey would have preferred that a broader obligation be imposed on employers. *See Hearings Before the Senate Subcomm. on Employment and Manpower*, 88th Cong., 1st Sess. 144-45 (1964) (statement of Sen. Humphrey on S. 1937, a bill that did not become a part of Title VII). Nevertheless, Humphrey employed individualist argument in support of Title VII and claimed that Title VII enacted individualist principle. *See, e.g.*, 110 CONG. REC. 11, 848 (1964):

> The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any persons, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices.

[353]*See, e.g.*, 110 CONG. REC. 7220 (1964) (remarks of Sen. Clark); 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey).

[354]The 1972 legislative history suggests, at least from the perspective of those who wrote the committee reports, both that Congress held this view in 1964 and that the view was naive. *See* H.R. REP. No. 238, 92d Cong., 1st Sess. 8-9 (1971).

[355]401 U.S. 424 (1971).

that renders it compatible with disparate treatment theory.[356] Nevertheless, it clearly authorizes impact theory and clearly postulates an interpretation of the statute that compels an analytical focus upon harm to groups. Specifically, the Court held that (1) as the congressional objective was to "achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees,"[357] use of unjustified neutral criteria with adverse effects on groups is prohibited and (2) Section 703(h)'s testing defense was not a bar to liability for the adverse effect of a test on a protected group because such an effect demonstrates that the test was "used to discriminate."[358] Oddly, the Court subsequently interpreted Section 703(h)'s seniority defense to preclude the application of impact theory to seniority systems, despite the similar language of the two defenses.[359] Indeed, the Court relied upon legislative history indicating that seniority principles would not be subject to attack under Title VII absent intentional discrimination in interpreting the seniority defense,[360] but declined, in *Griggs*, to treat the similar legislative history of the testing defense as establishing a disparate treatment rationale for the latter defense.[361]

In 1972, following *Griggs*, Congress amended Title VII, chiefly by modifying its procedural mechanisms.[362] No relevant modification of its substantive provisions was made. Bills that would have ratified *Griggs* interpretation of the testing defense were introduced, but rejected for reasons apparently independent of the merits of disparate impact theory.[363] Both the House and Senate reports on the legislation contain language that may be read as recognizing the *Griggs* decision and, perhaps, as approving of it. However, the thrust of the discussion in both reports is that (1) "experts" have indicated that discrimination

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[356]*See supra* text accompanying notes 288-91.

[357]*Griggs*, 401 U.S. at 429-30.

[358]*Id.* at 433. The Court relied also on the fact that amendments to the bill that would have exempted use of any professionally developed test were defeated. *Id.* at 434-36. However, this defeat, in conjunction with adoption of the testing defense with the promise that tests could be employed if not "designed, intended or used" to discriminate, indicates that Congress was concerned with the problem of pretextual use of tests, a species of disparate treatment, not with the effect of tests on minorities, as such. *Id.* at 433. *See* Rutherglenn, *supra* note 271, at 1305-06. *See also infra* note 407.

[359]International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[360]*Id.* at 350-52.

[361]*See* Gold, *supra* note 76, at 533-49. *But see supra* note 358. The anomaly has led to some embarrassment in attempting to explain the Section 703(h) merit defense. *See* Guardians Ass'n v. Civil Service Comm'n, 633 F.2d 232, 251-53 (2d Cir. 1980), *aff'd on other grounds*, 463 U.S. 582 (1983).

[362]Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

[363]H.R. 1746, 92d Cong., 1st Sess. § 8(c)(1971); 117 Cong. Rec. 17,539 (1971).

is a systematic rather than individual problem, (2) *Griggs* indicates that "expertise" is necessary in assessing the phenomenon and (3) EEOC enforcement authority should be expanded (as the 1972 amendments were designed to do) because the EEOC has such "expertise."[364] Finally, the section by section analysis of the committee reports indicates, without citing or referring to *Griggs*, that present case law (as of 1972) was intended to govern where the 1972 amendments did not expressly change the 1964 Act.[365]

The Supreme Court has subsequently cited the 1972 legislative history for the proposition that Congress "ratified" *Griggs*.[366] It has also, however, rejected reliance on the 1972 history, where no enacted amendment was in issue, on the ground that "the views of members of a later Congress, concerning different sections of Title VII. . . are entitled to little if any weight."[367]

Somewhat belatedly, the Court, following *Griggs*, has attributed the disparate impact theory to Section 703(a)(2). Specifically, it has argued that the provision's reference to classifications that "tend to deprive any individual of employment opportunities" or otherwise affect his status as an employee justifies prohibiting neutral criteria with an adverse effect on groups.[368] The Court's justification of the use of representation rate disparities in systematic disparate treatment litigation has been that Section 703(j) precludes liability only for disparities as such, it does not preclude reliance upon the inference of intentional discrimination arising from representation rate disparities.[369]

With respect to the question of voluntary affirmative action, the Court has conceded that affirmative action violates the literal language of Section 703(a).[370] The Court has argued, however, that the "spirit" of the statute is not violated because affirmative action tends to achieve the congressional objective of opening employment opportunity to per-

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[364]H.R. Rep. No. 238, 92d Cong., 1st Sess. 8-9 (1971); S. REP. No. 415, 92nd Cong., 1st Sess. 5 (1971). The closest Congress came to addressing the merits of *Griggs* was in a committee report in which the Senate committee discussed the 1972 extension of Title VII to federal employers and indicated that the Civil Service Commission should re-examine its testing procedures to ensure compliance with *Griggs*. *See* S. REP. No. 415, at 14-15.

[365]118 CONG. REC. 7166 (1972).

[366]Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982).

[367]International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977). Also, *compare* Local 28 of the Sheet Metal Workers' Int'l Ass'n, 478 U.S. 421, 466-70 (1986) *with* Firefighters Local 1784 v. Stotts, 467 U.S. 561, 582 n.15 (1984).

[368]Connecticut v. Teal, 457 U.S. 440, 448 (1982).

[369]*Teamsters*, 431 U.S. at 354 (1977). This is in keeping with the 1964 legislative history. *See* 110 CONG. REC. 7213 (1964).

[370]United Steelworkers v. Weber, 443 U.S. 193, 201 (1979).

sons traditionally barred from it.[371] Moreover, the Court has argued that the literal language of Section 703(j) precludes only governmentally compelled racial preferences; it does not preclude privately adopted "voluntary" preferences.[372]

C. *Alternative Theories of Statutory Interpretation*

It is probably the case that there is no authoritative, consistently applied theory of statutory interpretation in American jurisprudence.[373] Nevertheless, it is possible to identify a set of traditional theories that, albeit diverse, share the common element that courts are to defer to legislative judgments and to enforce legislative commands. Courts within traditional theories are conceived of, if not as servants of the legislature, at least as highly constrained by legislation.[374]

This is not to say that alternative theories within the traditional set share a common conception of what it means to be constrained by the will of the legislature. For example, a literalist strategy of interpretation purports to defer to legislative judgment by adhering to the literal meaning of statutory language.[375] Aside from the questions whether there is such a thing as literal meaning[376] or whether it is

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[371]*Id.*

[372]*Id.* at 205-08.

[373]H. HART & A. SACKS, *supra* note 11, at 1201. *See* Cox, *Ruminations on Statutory Interpretation in the Burger Court*, 19 VAL. U. L. REV. 287, 289-95 (1985).

[374]*See, e.g.*, H. HART & A. SACKS, *supra* note 11, at 1156-57, 1410-17. The force of this idea is best illustrated by the fact that even those who may be accused of placing primary emphasis upon the judicial interpreter of statutes feel nevertheless compelled to add that courts are in some sense bound by statutes. *See* DWORKIN, PRINCIPLE, *supra* note 11, at 119-77. For criticism of Professor Dworkin's tendency to simultaneously accept and reject the authority of the text, *see* Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983). Hart and Sacks may be interpreted as advocating a view consistent with (or, at least, a source of authority for) the nontraditional view that courts are the primary actors both in supplying a characterization of statutory meaning and in attributing a scope of operation to a statute. *Compare* H. HART & A. SACKS, *supra* note 11, at 1410-17 (courts should assume that legislature acted resonably) *with* DWORKIN, PRINCIPLE, *supra* note 11, at 326-31 (courts should interpret a statute to advance a policy that is the best political justification of the statute). *See generally* Wellman, *Dworkin and the Legal Process Tradition*, 29 ARIZ. L. REV. 413 (1987). Nevertheless, Hart and Sacks so surrounded their position with conditions, limitations and caveats that they can be viewed as within the position here deemed "traditional." *See* H. HART & A. SACKS, *supra* note 11, at 1415 (attribution of purpose by reference to common law baseline).

[375]*See* TVA v. Hill, 437 U.S. 153 (1978).

[376]If literalism is taken to mean that the text has a pristine meaning that "announces itself" to all comers, it is subject to the weak version of the claim that the interpretor supplies meaning. The weak version of this claim appears to be a statement about the mechanism of interpretation, that the means by which a text is understood is shared

possible to escape responsibility for supplying the minor premise in the syllogism of statutory application,[377] literalism arguably fails to take seriously the court's role as an implementor of statutes because it ignores the necessity that "servants" interpret the "commands" of masters to ensure effective implementation.[378] Similarly, purposive interpretation purports to defer to legislative judgment by implementing statutory policy. A difficulty with purposive interpretation, however, is the judicial discretion inherent in formulating statements of statutory purpose.[379]

There is no reason to be sanguine about either the descriptive plausibility of an agency conception of judicial role in the context of statutory interpretation or the probability that actual judicial power will be exercised within any theory of interpretation in a fashion wholly consistent with such a conception. It is in fact not a plausible understanding of the interpretive enterprise that judicial interpreters are mere passive conduits for conducting the legislative will.[380] The inter-

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practice within a community of speakers and listeners, rather than correspondence between words and things. *See generally* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (GEM Anscombe ed. 1963). A middle version of the claim, building on the weak version, simultaneously asserts both that texts do not constrain interpreters and that interpreters are nevertheless heavily constrained by the "interpretive communities" within which they are "embedded," in the sense that possible interpretations are those rendered possible by the changing practices of such communities. *See, e.g.*, S. FISH, *supra* note 29. The strong version of the claim is that texts are descriptively incapable of providing a meaning that binds interpreters and the "constraints" of interpretive community are in fact mere competing precepts of political ideologies. Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982). *See* Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388 (1942); Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947); Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L. J. 1063 (1981); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

[377]*See* Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981). On this view, there is a form of "literal meaning" in the sense, at least, that conventions preclude words from having any meaning the interpreter wishes them to have, but the interpreter remains responsible for his syllogism. *See also* J. SEARLE, EXPRESSION AND MEANING, STUDIES IN THEORY OF SPEECH ACTS 1-29, 117-36 (1979).

[378]*See* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 292 (1985). It is, however, possible to utilize this critique to justify a rather expansive judicial use of statutes, *see, e.g.*, Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (R. Pound ed. 1934); Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The Middle Road,"* 40 TEX. L. REV. 751 (1962); Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The Low Road,"* 38 TEX. L. REV. 392 (1960); Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The High Road,"* 35 TEX. L. REV. 63 (1956).

[379]*See* H. HART & A. SACKS, *supra* note 11, at 1413-17.

[380]There are two reasons to doubt the passivity thesis, related to two steps necessary

pretive enterprise confronts a legal text, but it can by no means be described as a passive activity. And it is not probable that a judiciary whose tradition is one of active, even aggressive law-making will behave passively. Nor, perhaps, is passivity, even if it were a plausible alternative, a desirable one. The tradition, despite the rhetoric of deference to legislative will, legitimates activist interpretation.[381]

The point of this invocation of the standard academic litany regarding interpretation is not merely to anticipate and deny the charge of naivete. It is also to forthrightly recognize that traditional theory cannot deliver on its promise: legislative "command" cannot in fact be pristinely realized in judicial interpretation and application of statutes, both because the significance of a statute within the factual circumstances in which it is sought to be applied[382] is necessarily supplied by its interpreter, and because courts as our tradition has understood

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to statutory interpretation. The first step is that of interpretation, the second of application. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975). The difficulty at the first step, that of establishing a meaning for the statute, is commonly thought to be that of the problematic character of language. It is more fundamentally, however, a problem of competing conceptions of what it means to establish such a meaning. For the literalist, the task is a matter of, for example, applying conventions. *See* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). For the intentionalist, it is a matter of ascertaining intention. *See* E. HIRSCH, JR., THE AIMS OF INTERPRETATION (1976). For those who view the reader as primary, it is a matter of attributing a meaning or purpose. *See, e.g.*, H. HART AND A. SACKS, *supra* note 11, at 1413-17; Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

The second step is that of establishing the significance of the statute within the factual context of a case. *See* E. HIRSCH, JR., *supra* at 49. The problem is, again, disagreement about how this descriptively can be and normatively should be done. For the positivist, language controls application; for the intentionalist, intention controls application; for those who believe that the reader is crucial, the minor premise supplied by the reader controls application. *See generally* Moore, *supra* note 377. In the present context, these two steps may be illustrated by the interpretive problems presented by Title VII. The first question is what does Title VII prohibit. For example, does it prohibit disparate treatment or disparate effect or both? The second question is application. For example, if Title VII prohibits disparate treatment, should that prohibition be applied to a "voluntary" affirmative action plan?

It should be noted that, although distinction between interpretation and application is traditional, the distinction has been challenged. *See generally* H. GADAMER, TRUTH AND METHOD (1984). The challenge, however, is in keeping with what is here deemed a nontraditional perspective. *See* HABERMAS, A REVIEW OF GADAMER'S TRUTH AND METHOD IN UNDERSTANDING AND SOCIAL INQUIRY (F. Dallmayr & T. McCarthy eds. 1977).

[381] *See generally* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L. J. 221 (1973).

[382] *See* R. DICKERSON, *supra* note 380 (generally distinguishing interpretation from application); E. HIRSCH, *supra* note 380, at 49 (distinguishing meaning and significance).

them are supposed to interpret and apply statutes reasonably, as "reasonably" is understood by persons engaged in interpretation and application understand it.[383]

Nevertheless, the traditional notion that a court is to enforce legislative command is not wholly devoid of meaningful content. Communication between legislature and court is plausible even if the mechanism of communication is neither the words of the statute as such nor the purpose of the statute as such, but is instead a shared understanding of practice within a "community." There are "on the wall" and "off the wall" interpretations.

However, the characterization of an interpretation as "on" or "off" the wall is largely dependent upon a choice between two alternative characterizations of legislative command related to alternative normative understandings of the judicial role. In current academic debate these alternatives are often stated as, on the one hand, treating a statute as the product of legislative compromise among contending interest groups seeking private advantage and, on the other, treating a statute, compatibly with its rhetorical justification, as a legislative judgment regarding the public welfare.[384] These current conceptualizations of the choice are related, however, to earlier conceptualizations of the choice as one between literalism and purposive interpretation or between (1) treating statutes as intrusions into the fundamental baseline of the common law to be narrowly confined and (2) treating statutes as sources of law to be used to modify the common law in service of legislative policy.[385]

Extreme versions of these alternatives illustrate their relationship to the normative question of judicial role. Under one alternative, courts are simultaneously responsible for preserving the common law (the subject matter of their independent authority to make law) and for nevertheless complying with legislative command. Compliance, however, is confined to the ascertainable limits of that command. For example, use of a statute as a source of policy for common law decision would be illicit because, for example, it would erroneously assume that the

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[383]H. HART & A. SACKS, *supra* note 11, at 1415. *See* Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982).

[384]*See, e.g.*, R. POSNER, *supra* note 378, at 262-72; Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 192-93 (1986).

[385]For examples of the first position, see Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Kelsen, *The Pure Theory of Law*, 51 LAW Q. REV. 786 (1935). For examples of the second, see Landis, *supra* note 366; Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886 (1930). *Compare* Pound, *Spurious Interpretation*, COLUM. L. REV. 379 (1907) *with* Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

legislature had adopted a policy to be used in such a way. In fact, legislatures adopt, under this understanding, statutes constituting political compromises about relatively narrow questions, not policies to be judicially employed beyond the subject matter of these questions.[386]

Under the second alternative the common law baseline enjoys no presumptive inviolability. The court's role, as a servant of the legislature, is to treat statutes as, at least potentially, statements of policy to be incorporated into the fabric of the common law.[387] This, however, does not imply a passive judiciary, because treatment of statutes as statements or sources of policy implies both a requirement that the policy be judicially articulated in terms broader than the relatively narrow questions addressed by a statute and an evaluation of the statute in assessing its worth as a basis for judicial law-making.[388] Indeed, the notion of incorporation into a common law may be obsolete under some versions of this view. Judicial law-making might more properly be characterized as proceeding by extensive extrapolation from judicially defined statements of statutory policy than as accommodation of statutory policy to common law principle.[389]

It should be apparent that any given adherent to one or the other of these positions is an adherent only in degree; the alternatives are extreme positions likely to be qualified in practice. It should also be apparent that the alternatives are related to underlying "political" positions. The alternative that legislation is to be narrowly confined to original legislative compromise, here termed "traditional theory," is compatible with individualism. The position that legislation is to be used to further judicially perceived statutory policy, here termed nontraditional theory, is compatible with the view that courts should play a substantial role in the post-New Deal "activist" state.[390] The Supreme Court's interpretation of Title VII is "off-the wall" when viewed from

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[386]*See* generally Easterbrook, *supra* note 385. *Cf.* R. EPSTEIN, *supra* note 247, at 19-31 (advocating plausibility of adherence to original text).

[387]*See* Landis, *supra* note 378. For a recent analysis proposing a similar function but rejecting the assumption that courts are subordinate "servants," see Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988).

[388]*See generally* G. CALABRESI, *supra* note 11.

[389]This is implicit in the notion that change may render statutes obsolete. *See generally* G. CALABRESI, *supra* note 11. The obsolesence characterization assumes a judiciary capable of ascertaining a set of principles consistent with change by reference to which a statute may be either used to advance these principles or confined or "overruled." To the extent, however, that the changed principles are not those of the essentially individualistic common law, but, rather, are the "activist" principles of the "administrative state," *see generally* B. ACKERMAN, *supra* note 285, statutes are likely to be used as legitimating foundations for pursuing these activist principles.

[390]*See generally* B. ACKERMAN, *supra* note 293.

the perspective of the former of these positions; it is "on-the-wall" when viewed from the perspective of the latter. The remaining sections of this article are devoted to supporting these contentions.

D. A Critique of the Court's Interpretations: Traditional Theory

The line of argument appropriately employed by others to establish the proposition that the Court's interpretation is off-the-wall given traditional norms[391] is as follows: (1) Congress clearly viewed the problem of discrimination as a problem of disparate treatment in 1964 and just as clearly prohibited disparate treatment.[392] (2) The political justification for this prohibition was the individualist ideal, and the rhetoric of this ideal permeates the legislative history.[393] (3) Congress did not directly address disparate impact theory in 1964, but did specifically disapprove of examples of disparate impact theory.[394] (4) Congress was clearly aware of the notion that racial imbalance could be construed to constitute discrimination and expressly rejected such a construction.[395] (5) Congress clearly contemplated a color blind and gender blind standard; it not only prohibited "required" preferences through Section 703(j), it also prohibited privately adopted preferences through Title VII's general prohibitions.[396]

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[391]This claim necessarily assumes that a traditional stance has in some sense resolved the establishing meaning and application of meaning dilemmas previously noticed. *See supra* note 380 and accompanying text. It does not, however, necessarily assume that any particular methodology be adopted. At the level of establishing meaning, it is possible for both a literalist and an intentionalist to agree on a meaning, and traditional theory often relies upon both language and the context of its use (the "intention" reflected in legislative history) to ascertain or attribute a meaning. At the level of application, matters are more difficult, because the rhetoric of the traditional stance, which states that the language of the statute just "applies" by virtue of its own force, or that the legislature intended a particular result in a given case, is implausible. Readers are responsible for establishing the significance of a meaning within the factual context of a case. *See generally*, Moore, *supra* note 377. Normative positions about just how this inevitable readers' discretion is to be exercised are therefore crucial. Nevertheless, it is not implausible for a traditionalist to claim, for example, that the disparate treatment meaning of Title VII applies to and therefore prohibits affirmative action by virtue of that meaning, even if this claim is more objectively described as an agreement among traditionalists that the meaning should be applied. It is not implausible because the traditionalist's normative position is that his discretion should be exercised in a fashion that appears (e.g., instrumentally) to confine application within the bounds of ascertained meaning (even if this position fails to achieve an agreed upon purpose of that meaning).

[392]Gold, *supra* note 76, at 491-503. *See* United Steelworkers v. Weber, 443 U.S. 193, 220 (1979) (Rehnquist, J., dissenting).

[393]Gold, *supra* note 76, at 513-20; *Weber*, 443 U.S. at 254 (Rehnquist, J., dissenting).

[394]Gold, *supra* note 76, at 520-49.

[395]Gold, *supra* note 76, at 503-11; *Weber*, 443 U.S. at 231-51 (Rehnquist, J., dissenting).

[396]*Weber*, 443 U.S. at 244-45 (Rehnquist, J., dissenting).

It is not necessary to repeat the details of this line of argument here. The proposition that the Court's interpretation is "off the wall" by reference to the traditional view will instead be supported by reference to the counterarguments of those who have responded to the noted line of argument. The importance of these counterarguments is that they assume and appeal to traditional norms. The objective of this rebuttal is to establish that this appeal is mistaken and that the Court's interpretation must, therefore, be justified by reference to nontraditional norms.

A preliminary point should, however, be first addressed. One of the theses of this article has been that "voluntary" affirmative action is not a phenomenon separable from Title VII liability theories, but is instead a consequence of those theories.[397] A second thesis has been, however, that the phenomenon and the theories are subject to alternative characterizations: they may be viewed either as a straight-forward effort to establish group rights to fair distribution of employment (the substantive distribution paradigm), or as overenforcement devices that merely incidentally and functionally yield such rights (the process of employment decision paradigm).[398] As will become evident from the discussion below, the first of these possibilities is more susceptible to this rebuttal than the second. It requires an extreme version of the traditional stance, perhaps the version of formalism, to wholly reject the overenforcement rationale. Nevertheless, there are alternative understandings of the overenforcement rationale dependent upon subtle matters of emphasis, judgment and degree in applying that rationale.[399] This rebuttal is plausibly directed to the overenforcement version of the Court's interpretations to the extent that version approaches the fair distribution rationale.

1. The Purpose Counterargument.—The chief counterargument is that the Court's interpretation is consistent with the purpose of Title VII.[400] The appeal is to the strategy of purposive interpretation. The purpose of Title VII is said to be that of improving the employment opportunities of minorities and of women. As disparate impact theory and voluntary affirmative action tend to accomplish this purpose, they are legitimate under, even compelled by, the statute.

There is no doubt that this was a congressional purpose, but this concession is not the end of the matter. Purposive interpretation is a

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[397]*See supra* text accompanying notes 58-78, 113-64.

[398]*See supra* text accompanying notes 320-39.

[399]*See supra* text accompanying notes 337-39.

[400]*E.g.*, United Steelworkers v. Weber, 443 U.S. 193, 202-04 (1979); Blumrosen, *supra* note 160; Blumrosen, Griggs *Was Correctly Decided—A Response to Gold*, 8 INDUS. REL. L. J. 443 (1986) [hereinafter Blumrosen, *Response to Gold*].

technique well within the accepted norms of legal interpretation, but there are risks inherent in the technique, well recognized by its advocates.[401] Every statute has both relatively concrete and relatively abstract purposes; courts, therefore, choose among statutory purposes in interpreting statutes. The more abstract the purpose chosen, the greater the judicial capacity to expand upon the statute and the greater the risk that a court may thereby pursue its own agenda. Statutes cannot be said to merely provide that courts are to go forth and do good and avoid evil merely because these are the statutes' purposes, without rendering them mere legitimating grounds for implementing judicial preferences regarding the public welfare. This is the reason that traditional versions of the purposive interpretation strategy take care to address only relatively concrete purposes.[402]

There is a further difficulty with the purpose argument: it ignores the problem of means. Indeed, the argument is in the following form: the congressional purpose in enacting Title VII was to improve employment opportunities for minorities and women; devices that instrumentally achieve this end are therefore required or permissible. But this is a misstatement of the statute. The statute adopts a means to its end: prohibiting disparate treatment. If that means is inadequate to accomplish the statute's end, that end does not itself justify judicial substitution of alternative means. Legislatures do not enact ends; they enact statutes. Something more is required to justify substitution: a conception of the legitimate role of courts under which they are entitled to ignore the political compromise inherent in legislative selection of means. That conception is incompatible with the traditional view of legitimate roles postulated by traditional theory.

2. The Unconsidered Case Counterargument.—A variation on the purpose argument is that disparate impact theory and voluntary affirmative action are unconsidered cases in the sense that Congress expressly considered neither.[403] They are merely instances of the common problem of cases not specifically contemplated or addressed by a statute but, nevertheless, within the "policy" of the statute. As it is well within traditional norms of statutory interpretation to apply the "policy" of statutes to unconsidered cases, the Court's doctrines are compatible with traditional norms.[404]

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[401]*See* H. HART & A. SACKS, *supra* note 11, at 1413-17.

[402]R. DICKERSON, *supra* note 380, at 87-102.

[403]*See, e.g,*. Blumrosen, *Response to Gold*, *supra* note 400, at 449; Schatzki, United Steelworkers of America v. Weber: *An Exercise in Understandable Indecision*, 56 WASH. L. REV. 51, 66-67 (1980).

[404]*See* Neuborne, *Observations on* Weber, 54 N.Y.U. L. REV. 546 (1979).

There are three difficulties with this argument. First, it is not entirely true that Congress did not consider disparate impact theory or voluntary affirmative action. It is true that neither "case" was directly postulated nor considered in the language of the statute or in its legislative history.[405] It is not true that the central features of both doctrines were unconsidered. Congress specifically considered and rejected work force imbalance as a basis for liability in Section 703(j),[406] specifically rejected a disproportionate effects understanding of discrimination in use of employment tests in Section 703(h),[407] and generally

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[405]*See* Blumrosen, *Response to Gold*, *supra* note 400, at 449; Gold, *supra* note 76, at 520-30.

[406]42 U.S.C. § 2000e-2(j) (1982). The legislative history of Title VII disclosed that Section 703(j) was inserted to confirm the representations of sponsors and supporters of Title VII, made in response to the claims of opponents that the legislation would require the use of quotas to achieve racial balance, that no such requirement was imposed. *See* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 452-65 (1986) (recounting legislative history); United Steelworkers v. Weber, 443 U.S. 193, 231-52 (1979) (Rehnquist, J., dissenting) (recounting legislative history). The Supreme Court later exploited a distinction between "require" and "permit" in concluding that Section 703(j) does not preclude "voluntary" quotas. *Weber*, 443 U.S. at 205-07. However, that distinction is highly questionable if the Court's liability theories functionally "require" such quotas. *See supra* text accompanying notes 58-78, 113-64. Moreover, the distinction for present purposes is overly technical. The point made in the text is that Section 703(j) reflects a broader principle, a principle compatible with the individualist model. Although Congress did not specifically contemplate the question of truly "voluntary" affirmative action (a question never in fact yet presented to the Supreme Court given the functional requirements of the Court's liability theories), it did contemplate and enact a general operating principle in Title VII, the disparate treatment prohibition.

[407]*See* Gold, *supra* note 76, at 533-49. At the time Title VII was debated in Congress, a decision was handed down under Illinois antidiscrimination legislation (the *Motorola* decision), holding employment tests generating adverse effects on minorities were unlawful under Illinois law. *See* 110 CONG. REC. 9030 (1964). Section 703(h)'s preservation of "ability tests" was a response to this decision, one that rejected adverse impact, at least as such, as a theory of liability. The Supreme Court, in Griggs v. Duke Power Co., 401 U.S. 424 (1971), later interpreted Section 703(h) as preserving only job-related tests. As Professor Gold has demonstrated, however, the protection afforded ability tests in Section 703(h) is complete *absent* their use to intentionally discriminate. Gold, *supra* note 76, at 533-49. In particular, the principal proponents of Title VII represented to their colleagues in debate over the initial version of the Tower amendment (which would have totally immunized employment tests from challenge) that "nothing in the bill authorizes such action as in the *Motorola* case." 110 CONG. REC. 13,504 (June 11, 1964) (remarks of Sen. Case). *See id.* (remarks of Sen. Humphrey). Moreover, the concern expressed by these proponents was with the potential for pretextual use of tests to engage in disparate treatment. *See id.* (remarks of Sen. Humphrey). The version of the Section 703(h) testing defense eventually enacted reflected this concern with pretextual use. *See* 110 CONG. REC. 13,724 (1964).

Nevertheless, it is possible to read *Griggs* as consistent with the intentional discrimination rationale. *See supra* text accompanying notes 288-91. The absence of a reasonable

rejected group rights understandings of the antidiscrimination principle throughout the legislative history of the Act.[408] While it is quite true that Congress did not anticipate the precise features of the Court's later doctrines, it is not the case that it did not anticipate, and reject, the central features and functional implications of these doctrines.

Second, even if it were true that the Court's doctrines were unconsidered, the question would remain whether the policy of the Act supports them. It is perhaps the case that the abstract purpose of improving employment opportunities for minorities and women supports them, but this merely raises the problem of abstract purpose discussed above.

Third, disparate impact theory and affirmative action are not plausibly classified as instances of the common problem of the unconsidered case, unless they are understood as mere expressions of disparate treatment theory, for example, as aspects of an overenforcement strategy as discussed earlier.[409] If the Court's doctrines are understood and applied in terms of group rights—as means of recognizing a right in minority or female groups to proportional allocation of employment opportunity—they are instances of the provided for case; the individualist conception that permeates the language and legislative history of Title VII would preclude them. Even if they can be said to have been unconsidered in their precise features, the policy of the statute so conceived is hostile to group rights. If the doctrines are instead understood as instances of or inevitable consequences of overenforcement of the disparate treatment prohibition,[410] they are plausibly characterized as unconsidered cases at least arguably compatible with statutory policy. However, there is a significant implication to this characterization. It is that both doctrines would have to be severely constrained so as to reflect a disparate treatment enforcement strategy rather than an equal group-achievement strategy. In the terminology of the earlier discussion of overenforcement, the doctrines would have to be applied by reference to a process paradigm, rather than a distribution paradigm.[411]

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relationship between preference on an ability test and actual job content is evidence of pretextual use of the text. Whether this is a viable reading of *Griggs*, however, is dependent upon the standard of validity imposed on testing. If more is required than a reasonable relationship, there is imposed, pro tanto, a prohibition of adverse effect on groups. And it is the latter prohibition that Congress rejected when it disapproved of the Illinois decision.

[408]The Clark-Case memorandum is illustrative. *See supra* note 350.

[409]*See supra* text accompanying notes 276-339.

[410]*See supra* text accompanying notes 276-339.

[411]*See supra* text accompanying notes 332-39.

3. The Section 703(a)(2) Counterargument.—The most persuasive support for disparate impact theory in the language of Title VII is Section 703(a)(2), because that provision appears to reference effects: an employer is not permitted to "limit, segregate, or classify his employees in a way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals race . . . ."[412] Indeed, the Court has relied on Section 703(a)(2) as justification for impact theory.[413]

Aside from the probable source of the language of the provision in a congressional purpose to preclude employer and union collusion in disparate treatment,[414] the Court's reliance is mistaken for three reasons. First, the language is in terms of tendencies and effects with respect to an individual, not with respect to a racial group. The Court has suggested that disparate impact theory protects individuals, so that group success under a neutral criterion does not preclude an individual member of the group from invoking disparate impact theory,[415] but the Court's argument is disingenuous: the individual cannot establish a *prima facie* case under the theory without making out group harm.[416] Absent an adverse effect of neutral criteria on the group, the theory is unavailable; adverse effects on the individual are irrelevant.

Second, the provision requires harm generated "because of" race, a causal notion implicating disparate treatment theory. For this language to support the disparate impact theory, it must be read as invoking a notion of correlation, not of causation: harm correlated with group status is prohibited. But this reading again ignores the focus of the language on the individual; the individual must not be harmed because of his race.

Third, the Court's reading ignores the legislative history taken as a whole. That history again is clear on the point that the language was understood to prohibit disparate treatment.[417] At best, the language, read in conjunction with that history, would support use of disparate impact theory as a device for reaching suspected pretextual use of neutral criteria, but this would again require confining the theory to an overenforcement strategy.[418] In particular, it would require a relatively relaxed version of the business necessity defense.[419]

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[412]42 U.S.C. § 2000e-2(a)(2) (1982).

[413]Connecticut v. Teal, 457 U.S. 440 (1982).

[414]Gold, *supra* note 76, at 568-78.

[415]Connecticut v. Teal, 457 U.S. 440 (1982).

[416]P. Cox, *supra* note 12, at 7.01[2].

[417]*See* Gold, *supra* note 76, at 564-67.

[418]*See supra* text accompanying notes 332-39.

[419]*See* Rutherglenn, *supra* note 271, at 1312-29.

4. The Deference to Administrative Expertise Counterargument.—It is sometimes said that both impact theory and affirmative action doctrine properly rest on judicial deference to the views of the EEOC, as a matter of the traditional doctrine of deference to administrative agency expertise.[420] The difficulty with this view is that the traditional doctrine of deference, outside the context of Title VII, is confined to the views of agencies upon which Congress has conferred substantive rule making or adjudicative powers.[421] The EEOC enjoys neither power; it is an enforcement agency.[422] Application of the traditional doctrine to the EEOC is analogous to deferring to a prosecutor's office in construing a criminal statute. That the Court has chosen to ignore this point is not plausible evidence that deference is appropriate.[423]

5. The Ratification Counterargument.—The primary argument made by those advocates of the Court's doctrines who at least partially concede that the doctrines are not supportable by references to the 1964 legislation is that Congress ratified *Griggs* in the 1972 amendments.[424] If Congress ratified *Griggs*, it at least arguably prospectively ratified "voluntary" affirmative action because, as we have seen, the doctrines are so closely intertwined that "voluntary" affirmative action is implicit in disparate impact theory.[425]

The first difficulty with this argument is that it rests on a very slim reed. Congress did not address disparate impact theory in the 1972 *amendments*. Rather, the House and Senate *reports* addressed it in the context of making the argument that the EEOC's enforcement authority should be expanded. Specifically, the reports cite *Griggs* for the proposition that discrimination is a complex phenomenon requiring "expertise" for its assessment.[426] There is no indication that Congress

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[420]*See* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Blumrosen, *Response to Gold*, *supra* note 3, at 447.

[421]*See* American President Lines v. Federal Maritime Comm'n, 316 F.2d 419 (D.C. Cir. 1963); Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785 (2d Cir.), *aff'd*, 328 U.S. 275 (1946); *cf.* Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) (regulation does not have force and effect of law absent express congressional delegation of substantive rulemaking authority). *But cf.* Skidmore v. Swift & Co., 323 U.S. 134 (1944) (agency interpretations entitled to respect).

[422]*See* 42 U.S.C. § 2000e-5 (1982).

[423]Nevertheless, the Court's conferral of substantive rule making authority on an enforcement agency to which Congress declined to give substantive rule making powers is consistent with the bureaucratization of Title VII. *See infra* text accompanying note 492.

[424]*See* Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982); Thomson, *The Disparate Impact Theory: Congressional Intent in 1972—A Response to Gold*, 8 INDUS. REL. L. J. 105 (1986).

[425]*See supra* text accompanying notes 58-78, 113-64.

[426]H.R. REP. No. 238, 92d Cong., 1st Sess. 8-9 (1971); S. REP. No. 415, 92d Cong., 1st Sess. 5 (1971).

was either aware of or considered *Griggs*' implications, particularly as these did not become fully apparent until 1975, when the Court decided *Albemarle Paper Co. v. Moody*[427] and, perhaps, 1979, when the Court decided *United Steelworkers v. Weber*.[428] Moreover, although there were attempts in 1972 to ratify *Griggs* directly, these were ultimately rejected.[429] It is true that the conference report on the 1972 bill states, without referring to *Griggs*, that then current interpretations of Title VII are to control where the Act was not specifically modified by the 1972 amendments.[430] But this is a statement about the limited effect of the amendments, not an open-ended authorization for the Court to proceed down a road *Griggs* itself only ambivalently suggested, particularly in view of the fact that explicit attempts at confirming *Griggs* were rejected in the 1972 conference committee.[431]

The more fundamental objection to the ratification argument, however, is that it does not rely either upon a congressional enactment or upon legislative history as an aid to understanding of such an enactment. It relies, rather, upon legislative history, as such. Moreover, this objection would be necessary even if that legislative history were not ambivalent as an expression of approval of the Court's then and later doctrines. Congress does not enact legislative histories; it enacts statutes. The statute it has enacted, as that statute is relevant here, is the 1964 Act, not the ambiguous views of the writers of a 1972 legislative report.[432]

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[427]422 U.S. 405 (1975). In *Albemarle*, the Court imposed a strict requirement of test validation, treating EEOC guidelines on the matter as de facto agency rules, despite the absence both of administrative rule making authority and the absence of compliance with the Administrative Procedure Act. *Griggs* certainly implied a group rights theory of antidiscrimination law, but *Albermarle* confirmed it by treating the business necessity/job relatedness defense in a fashion incompatible with a pretext theory of discrimination. It is no accident that Chief Justice Burger, the author of *Griggs*, dissented in *Albemarle*. 422 U.S. at 449.

[428]443 U.S. 193 (1979).

[429]*See* H.R. 1746, 92d Cong., 1st Sess. 8(c) (1971) (amending Section 703(h) testing defense); S. 2515, 92d Cong., 1st Sess. 4(a) (1971) (amending Section 706(g) to eliminate intentional discrimination as a condition to remedial relief). The bills discussed in the committee reports were not enacted. Gold, *Reply to Thomson*, 8 INDUS. REL. L. J. 117 (1986). The attempt in the House to codify *Griggs* was accepted in committee and defeated on the floor. *See* 117 CONG. REC. 31,979-85, 32,088-32,113 (1971). The attempt in the Senate was successful, 118 CONG. REC. 4944-48 (1972), but was dropped in conference. *See* JOINT EXPLANATORY STATEMENT OF MANAGERS AT THE CONFERENCE ON H.R. 1746 TO FURTHER PROMOTE EQUAL EMPLOYMENT OPPORTUNITIES FOR AMERICAN WORKERS *reprinted in* 1972 U.S. CODE CONG. AND ADMIN. NEWS 2179, 2183.

[430]118 CONG. REC. 7166 (1972).

[431]*See supra* note 429.

[432]*See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977).

6. The Ratification By Silence Counterargument.—A version of the ratification argument, employed by the Court as a justification for adhering to its "voluntary" affirmative action precedent, is that Congress has "ratified" that precedent by failing to overturn it.[433] The initial difficulty with this argument is that it is difficult to take seriously. If the Court had an even relatively consistent record of adhering to its interpretations, one could plausibly understand this argument as an expression of a prudential policy of fostering and preserving settled expectations,[434] but the Court has no such record.[435] The second difficulty with the argument is that it rests on the questionable metaphor of a continuing dialogue between Court and Congress. The metaphor is questionable because, although the Court's decisions allocate the burden of legislative inertia, the Court does not control legislative agenda. There is no continuous dialogue between Court and Congress; there are instead sporadic, haphazard, unpredictable and typically isolated interactions.

The third difficulty is that the Court's decisions *do* allocate the burden of legislative inertia, and, in the present context, that burden is fatal. Neither of the chief interest groups with the organization and power to attempt a legislative assault on the Court's affirmative action edifice, civil rights groups or employer organizations, have any incentive to do so. The persons adversely affected by the edifice are isolated individuals.[436] Moreover, opposing political forces on the question of affirmative action are and have been for twenty years in equipoise: neither is sufficiently powerful either to legitimize voluntary affirmative action or to repeal it through legislation.[437]

E. On Understanding The Court's Interpretations: Nontraditional Theory

The point of the preceding section of this article was not that the Court's doctrines are illegitimate. Rather, the point was that the Court's doctrines are illegitimate, indeed, incomprehensible, within the perspective of a traditional understanding of judicial function in interpretation and application of legislation. The point of this section is to claim that a compromise theory of "voluntary" affirmative action is comprehensible and legitimate within an alternative perspective.

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[433]Johnson v. Transportation Agency, 107 S. Ct. 1442, 1450 n.7, (1987).

[434]*See* E. Levi, An Introduction to Legal Reasoning 38 (1948).

[435]*See Johnson*, 107 S. Ct. at 1472-73 (Scalia, J., dissenting).

[436]*Id.* at 1475-76.

[437]*See* N. Glazer, *supra* note 6, at 215-17; Sherain, *The Questionable Legality of Affirmative Action*, 51 J. Urban L. 25, 41 (1973).

Perhaps the most direct means of approaching this alternative perspective is through Ronald Dworkin. Professor Dworkin claims that Title VII may be read either as prohibiting or authorizing "voluntary" affirmative action.[438] The Court is free to choose which of these alternatives is the best interpretation of the statute. The best interpretation is derived from a theory of "fit": the statute should be interpreted "to advance the policies or principles that furnish the best political justification of the statute."[439] The "best political justification" is a matter of judicial choice between conceptions of the concept of equality, but the choice should be one not incompatible with the provisions of the statute and compatible with the political climate of the times.[440] According to Professor Dworkin, both the individualist conception, one that would preclude voluntary affirmative action, and the group equality conception, one that would authorize voluntary affirmative action, equally fit Title VII on this test.[441] The choice then becomes a matter of sound political morality, the Court properly authorized voluntary affirmative action because it reflects the sounder version of political morality.[442]

It should be apparent that this argument assumes that Title VII does not provide an answer to the choice, that it enacts merely a "concept" and not a "conception" of equality.[443] It assumes, as well, that the Court would be bound to follow an individualist conception if Title VII had enacted such a conception. The first of these assumptions denies that Title VII clearly prohibits "voluntary" affirmative action. So it is important to examine the argument that it does not. The second assumption would become irrelevant if it is taken seriously and if the first assumption was refuted. The claim to be made below, however, is that it cannot be taken seriously because the method by which Professor Dworkin and others, including the Supreme Court, reach the first assumption ensures that statutes will not provide answers which bind the courts. The claim then, is that although Professor

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[438]DWORKIN, PRINCIPLE, *supra* note 11, at 328; *cf.* DWORKIN, EMPIRE, *supra* note 193, at 394-97 (absent prejudice, political process may consitutionally seek egalitarian resource redistribution). In Professor Dworkin's terms, the alternatives are (1) promotion of economic equality and (2) banning all race-concious criteria.

[439]DWORKIN, PRINCIPLE, *supra* note 11, at 328-29. *See id.* at 146-77; DWORKIN, EMPIRE, *supra* note 193, at 225-58, 313-54.

[440]DWORKIN, PRINCIPLE, *supra* note 11, at 326-29.

[441]*Id.* at 328-29.

[442]*Id.*

[443]For Professor Dworkin, a "concept" is an abstract notion (such as equality) subject to differing understandings of what this "concept" requires. More concrete understandings are "conceptions." Concepts are uncontroversial; conceptions are controversial. *See, e.g.*, DWORKIN, EMPIRE, *supra* note 193, at 71.

Dworkin provides a rationale for the Supreme Court's interpretation of Title VII, the rationale, rather than its persuasive or unpersuasive character, is the important descriptive point. The rationale, as the subject of inquiry, explains the Court's interpretation not because it is persuasive, but because it tells us something important about the Court and about the Court's "conception" of its function.

1. The Rhetoric of Nontraditional Theory.—Although nontraditional theory is distinguishable from traditional theory in the expansive role it confers on courts in using statutes to further their policies, its rhetoric often justifies conclusions by reference to norms compatible with the traditional position. The argument in this subsection uses Dworkin's argument to illustrate the point that nontraditional theory nevertheless deviates from those norms.

Professor Dworkin's method for concluding that Title VII enacts merely a concept and not a conception is initially commonplace: (1) the language of the statute does not address the question of voluntary affirmative action; (2) the "institutional intention" of Congress reflected in legislative history may not be relied upon absent a clear legislative convention that this history was to be a part of the enacted text of the statute; and (3) there is no such thing as a reliable collective congressional intention that can be derived either from the statute or from its legislative history.[444]

It is possible to dispute each of these points, and they are disputed in the footnote.[445] The present objective, however, is to identify method.

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[444] *Id.* at 321-26.

[445] Some of these points are discussed *supra* in text accompanying notes 391-437. The argument that there is no such thing as a collective psychological state of legislative intention is correct in some senses and not correct in others. It is surely correct if one means by it a collective, subjective motivation for passing a statute, DWORKIN, EMPIRE, *supra* note 193, at 315-16, or collective agreement about how the statute would be applied within a given factual scenario that had not been expressly contemplated at the time of enactment. But these possibilities do not exhaust the matter. There is such a thing as a collective understanding, even if in relatively abstract terms, of the policy or principle enacted. *See* J.W. HURST, DEALING WITH STATUTES 32-40 (1982). If there were not such a thing, the very notion of legislation would be implausible. *See* Cox, *supra* note 29, at 338-41.

The argument that legislative history may count as a statement of institutional intention only if there is a legislative convention making it so is too strong. Such a convention would certainly add weight to the statement, but the absence of a convention should not render the statement excludable. The absence of a convention merely renders the question of weight part of the interpretive agenda, so it must be determined whether the statement is a credible guide to understanding the policy or principle of the statute. Professor Dworkin seems to have realized this in arguing elsewhere that the statements of legislators are political acts that are a basis for deciding what interpretation of a statute makes it "best." DWORKIN, EMPIRE, *supra* note 193, at 313-54.

The curiosity important in Professor Dworkin's method is its quality of having and eating the relevant cake.[446] Professor Dworkin is simultaneously intent upon excluding evidence that might be marshalled in an argument against the conclusion that no conception was enacted, and upon insisting that the statute nevertheless binds the Court. He excludes the evidence of legislative history by claiming that, absent a firm convention under which congressmen understand that legislative history is a part of statutory enactment, such history may not be relied upon as evidence of an "institutional intention."[447] Moreover, he rejects the notion of a collective legislative intent apart from convention because there is no such thing as a shared psychological intent of the legislature.[448] In what sense, then, is the Court "bound" by the statute? It would apparently be bound in Dworkin's argument if the language of the statute specifically addressed the precise question of "voluntary" affirmative action. However, neither Section 703(a) nor Section 703(j) is, for Dworkin, sufficient for this purpose. Section 703(a)'s general prohibition of discrimination is insufficiently precise to constitute an express legislative contemplation of voluntary affirmative action, and Section 703(j) addresses merely "required," not "voluntary" preferences.[449]

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[446]Arguably, this is a criticism that may be made of Dworkin generally. *See* Fish, *supra* note 375.

[447]DWORKIN, PRINCIPLE, *supra* note 11, at 325.

More specifically, Professor Dworkin dismisses that portion of the legislative history predating the adoption of Section 703(j), in which sponsors, managers and supporters of the Title VII argued that the Act would neither permit nor require race conscious programs, because the adoption of Section 703(j) establishes that Congress had no convention that would make these arguments a part of the statute. *Id.* The adoption of Section 703(j) certainly suggests that the congressmen did not trust the prior legislative history as a bar to an interpretation of the statute that would require race conscious programs (with, as it turns out, good reason). It does not establish either the absence of a convention or the irrelevance of the earlier history, except on the assumption that legislative history is inadmissable absent a very strong form of convention.

Professor Dworkin, however, is not alone in criticizing reliance on legislative history. *See* Hirschey v. Federal Energy Regulatory Comm'n, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring). The plausibility of such reliance would seem, however, to be a matter of the weight to be assigned to history rather than its admissibility and to be a matter of the purpose for which it is used. The weight assigned is justifiably greater where the history recounts a full and intensive congressional debate than, for example, a committee report where it is not clear that the report became the subject of or came to the attention of the full body in debate. Similarly, a judicial purpose to clarify ambiguous statutory language is more justifiable than a purpose to rely on history as the source for a rule that finds no support in the language of the statute itself.

[448]DWORKIN, PRINCIPLE, *supra* note 11, at 322-24.

[449]*Id.* at 327. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979).

This analysis permits Dworkin to claim that the Court must engage in a "fit" analysis. Two conceptions equally "fit" the statute: the statute may be read to forbid all discrimination (the individualist conception) or may be read to permit benign discrimination (the group conception).[450] The latter possibility is grounded, ironically enough, on the claim that Congress intended to preserve employer discretion, in the sense that a policy of preserving employer discretion had wide political appeal at the time of enactment.[451] The former possibility is similarly grounded; color blindness rhetoric also had currency and political appeal at the time of enactment.[452]

What is interesting about this line of reasoning is what it leaves out. The first matter omitted is the question of characterization: in what sense can affirmative action be said to be "voluntary" and, therefore, not within Section 703(j)'s express prohibition of "required" preferences? Given the relationship between the Court's theories of liability, the employer incentives generated by these theories and employer-adopted race and gender preferences, affirmative action is "voluntary" only in the sense that it is not formally required.[453] Employer discretion is preserved, then, in the sense that employers may either engage in affirmative action or risk liability for race and gender imbalance in their work forces. The "fit" criteria Professor Dworkin advocates is of a peculiar sort, for the statute is made to "fit" a "chain" of interpretations[454] of a highly amended variety. This prior "chain" of interpretations could of course be used to justify affirmative action in an argument Professor Dworkin does not employ; judicial permission to engage in benign discrimination "fits" the "chain," even though it does not "fit" the statute as originally enacted. Adoption of this argument, however, would require a concession that the Court's "chain" of interpretations "changed" the statute; a concession neither Professor Dworkin nor other nontraditionalists can make without abandoning their claim of adherence to traditional norms.[455]

The second matter omitted is the relationship between the "conceptions" said to have had currency and appeal at the time of enactment, even though they were not enacted. In Professor Dworkin's view these conceptions are incompatible alternatives from which the Court must

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[450]DWORKIN, PRINCIPLE, *supra* note 11, at 327-28.

[451]*Id. See* United Steelworkers v. Weber, 443 U.S. 193 (1979).

[452]DWORKIN, PRINCIPLE, *supra* note 11, at 328.

[453]*See supra* text accompanying notes 58-78, 113-64.

[454]*See* DWORKIN, PRINCIPLE, *supra* note 11, at 158-62 (invoking the notion of a chain of interpretations and a requirement that judges must adopt an interpretation that best fits this chain as a constraint on discretion).

[455]*See id.* at 160 (judge must interpret, not invent a legal history).

choose. This leaves out, however, the clear possibility that they may be reconciled. They are reconciled within the individualist conception; employer discretion is preserved by confining Title VII to a prohibition only of disparate treatment, as it is precisely the limited character of that prohibition that minimizes the intrusion of collective decision into private discretion.[456] The incompatibility between the conceptions arises only by virtue of the first matter left out: employer discretion has been antecedently confined through a prior "chain" of interpretation generating the Court's liability strategies. As Professor Dworkin fails to consider the meaning of "required" and "voluntary" and therefore fails to recognize the Court's responsibility for creating the phenomenon of "voluntary" affirmative action, he entertains the fiction that private employer conduct, and, therefore, a policy of preserving private discretion, is in issue. This argument, however, is a bootstrap. It amounts to a claim that employers should be permitted, in their discretion, to do what the Court's chain of interpretations compels them to do.

The third matter omitted is that there is a version of legislative intent between the polar extremes of a collective legislative will and a concrete expression through the language of a statute or of legislative convention.[457] The difficulty with Professor Dworkin's argument about collective psychological states (and with much realist analysis of legislative intent) is that it attacks a straw man.[458] It is indeed implausible that legislators share a common set of hopes, fears, and preferences about legislation or a common set of motiviations for voting for it. It is also implausible that even those legislators who think about the proposals before them share a common set of hypothetical factual scenarios to which they contemplate application of a statute. But this does not compel the conclusion that legislators merely share an abstract "concept." They can and do share relatively concrete conceptions.[459]

These conceptions do not "announce" their meaning or significance within the factual scenario presented to a court; the responsibility for interpretation and application is inescapably the court's. Nevertheless, both the language of the statute and its legislative history, even absent a legislative convention regarding such history, are evidence from which to build an understanding, and from which the understanding, once achieved, may be reasoned. It might be said that Professor Dworkin does not disagree with these assertions and that he merely asserts and supports one of a number of possible understandings, but he does

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[456]*See supra* text accompanying notes 29-54.

[457]*See* Cox, *supra* note 29, at 329-58.

[458]*See* MacCallum, *Legislative Intent*, 75 YALE L.J. 754, 771-75 (1966).

[459]*See* Cox, *supra* note 29, at 334-41.

disagree. He is intent upon delegitimizing the authority both of the language of the statute and of its legislative history as expressions of a conception, because he wishes to give the Court the discretion to choose between conceptions. This intention explains why legislative history, unless it satisfies Dworkin's test of admissibility, is excluded; why the consistent statements of sponsors of the legislation invoking the individualist model are converted by Professor Dworkin's argument into "the political climate of the times"; why Professor Dworkin gives Section 703(j) no force beyond "required" preferences; and why he declines to consider the question of just what content can be plausibly given to the distinction between required and "voluntary" preferences.

Professor Dworkin's ultimate point—that the Court is to choose between conceptions on the basis of its view of sound political morality—is correct in the sense that courts must choose between the traditional and nontraditional interpretive approaches and between the political moralities implied by these alternatives. It is, however, not correct as a claim that Title VII enacts no conception. Professor Dworkin's analysis, despite its appeal to "fit," is best understood as a choice of nontraditional theory. More specifically, his analysis best "fits" the proposition that statutes should be viewed as if they enact broad concepts and, therefore, are authorizations for the courts to select and implement preferred conceptions.[460]

2. Nontraditional Theory Viewed Functionally.—Professor Dworkin, however, is merely an example of nontraditional theory. Eschewing Dworkinian pyrotechnics, some have made the straight-forward claim that it does not matter what Congress thought in 1964 or even in 1972 because subsequent developments—post-enactment academic reformulations of appropriate policy or changes in zeitgeist—authorize the Court's interpretations.[461] Others would apparently reject the traditional notion that courts are bound by statutes, on the grounds either that statutes are incapable, as a descriptive matter, of binding courts,[462] or that statutes cannot keep pace with social, political and moral change. Therefore, courts should not, as a normative matter, be bound by original legislative understandings.[463] The present question is not the legitimacy or illegitimacy of these views. The point, rather, is that,

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[460]*Cf.* M. SANDEL, *supra* note 166, at 135-42 (Dworkin's limited conception of individual rights permits largely unconstrained utilitarianism); Cotterrell, *Liberalism's Empire: Reflections on Ronald Dworkin's Legal Philosophy*, 1987 AM. B. FOUND. RES. J. 509, 515 (noting that Professor Dworkin's version of liberalism inevitably wins in his own interpretations).

[461]Fallon & Weiler, *supra* note 6, at 17-18.

[462]*Cf.* S. FISH, *supra* note 29 (community, not text, binds interpreters).

[463]*See generally* G. CALABRESI, *supra* note 11.

whatever the particular justification argument, nontraditional theories minimize the binding force of statutes and maximize the law and policy creation function of courts by treating statutes as open-ended conferrals of authority.

Indeed, it is possible to identify central features of nontraditional theory compatible with the Court's treatment of Title VII. First, central to nontraditional theory is a descriptive claim about the improbability of formalist theories of law, combined with an emphasis upon the independent responsibility of courts to interpret the meaning attributed to legislation.[464] Second, equally central to nontraditional theory is elevation of the judiciary to a preeminent status. This is a significant extension of the claim that courts have an independent responsibility to advance statutory purposes, because courts are not viewed merely as independent. They are instead viewed as keepers of a cultural heritage, of transcendant values, of a changing zeitgeist, even of our collective political morality.[465] Moreover, they are viewed not as the keepers of common law to be distinguished from statutory law, but rather as keepers of a legal fabric that includes elements of common law, statutes, principles and policies derived from statutes.[466] Third, nontraditional theory is careful to defend itself against the argument that its third feature renders it a tyrant. It is said not to be tyrannical because it is confined by the necessity of dialogue, the conventions of rational discourse within that dialogue, and by its supposed expertise in ascertaining and extrapolating from underlying fundamental values.[467]

Fourth, the passage of time is emphasized by nontraditional theory's approach to statutes. The basic notion is a diagnosis of rapid obsolescence: original legislative understandings, even if discoverable, are rendered irrelevant over time, so that statutes are to be employed in service of current judicial understandings of social need or judicially constructed principle.[468] Fifth, nontraditional theory insists that the fabric of the law has, at least in general, a politically neutral logical coherence for which the courts are responsible.[469] The fabric is coherent by reference to a political morality or moralities identified by courts,

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[464]*See, e.g.*, DWORKIN, PRINCIPLE, *supra* note 11, at 131-37, 316-31; DWORKIN, EMPIRE, *supra* note 193, at 313-27.

[465]*See* G. CALABRESI, *supra* note 11, at 91-119; DWORKIN, EMPIRE, *supra* note 193, at 176-266.

[466]*See* G. CALABRESI, *supra* note 11, at 129-31.

[467]*See* G. CALABRESI, *supra* note 11, at 111-114; DWORKIN, EMPIRE, *supra* note 193, at 397-99.

[468]*See generally*, G. CALABRESI, *supra* note 11; DWORKIN, EMPIRE, *supra* note 193, at 348-50; Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

[469]*See* G. CALABRESI, *supra* note 11, at 96-101; DWORKIN, EMPIRE, *supra* note 193, at 397-99.

but the identification is politically neutral in the sense that it is not by reference to transient or even judicially preferred ideologies, but rather to fundamentals, derived from tradition or implicit in the fabric of law itself. The judicial function is, therefore, to incorporate statutes into this fabric, both in the sense that statutes are potential sources of development within the fabric, and in the sense that they are to be treated as serving public welfare ends compatible with the fabric.[470]

These features of nontraditional theory characterize the Court's interpretations of Title VII. The Court has eschewed close attention to text and to legislative history and instead embraced the most abstract of congressional purposes as a touchstone for decision—economic equality of groups.[471] It is not coincidental that this touchstone maximizes the Court's discretion to develop a regulatory apparatus in instrumental service of abstract purpose. Nor is it coincidental that this abstract purpose is a virtual restatement of a central tenet of a political morality that appeared and gained force after 1964.[472] The Court's justification for this process has included elements not merely of original and abstract congressional purpose, but of post-enactment political climate,[473] of appeals to the Court's responsibility for the "fabric of the law," and of the passage of time as a reason to deemphasize original understanding.[474]

There is, however, a final feature of nontraditional theory of which the Court's interpretations of Title VII is perhaps the best example. Nontraditional theory authorizes and legitimates bureaucracy, understood both as bureaucratic organization and as the "activist" agenda to which such organization is devoted. Consider an extreme version of traditional theory, legal formalism's[475] understanding of statutes. At

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[470]*See* G. CALABRESI, *supra* note 11, at 101-09. *Cf.* DWORKIN, PRINCIPLE, *supra* note 11, at 326-31 (court's task is to interpret so as to further the "best political justification" of the statute). *But cf.* DWORKIN, RIGHTS, *supra* note 29, at 111 n.1 (statutes enact policies, not principles).

It is apparent that this view would also authorize limiting, perhaps even "overruling," a statute thought to be out of keeping with the fabric. *See generally*, G. CALABRASI, *supra* note 11. *Cf.* Wellington, *supra* note 381, at 264 (advocating use of clear statement rules). It therefore arguably has a feature reminiscent of the traditionalist's preference for the common law.

[471]*See* United Steelworkers v. Weber, 443 U.S. 193, 228-30 (1979) (Rehnquist, J., dissenting) (criticizing the Court on this ground).

[472]*See* Fallon & Weiler, *supra* note 6, at 17-18.

[473]An example is the Court's reliance upon the 1972 legislative history. *See supra* text accompanying notes 424-32.

[474]*See* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1458-59 (1987) (Stevens J., concurring); United Steelworkers v. Weber, 443 U.S. 193, 215 (1979) (Blackmun, J., concurring).

[475]"Formalism" means a general tendency to favor treating statutes as "rules" with

least in its perhaps caricatured form, formalism: (1) would insist upon adherence to original understanding as the sole legitimate "law";[476] (2) would confine law to the scope of that original understanding, so that the unprovided-for case is one not governed by law (and so, either an embarrassment or subject to a motion to dismiss);[477] (3) would reject the passage of time and changed conditions or political climate as justification for ignoring original understanding;[478] (4) would be centrally concerned about allocating legal decision-making authority, so that only specified institutions legitimately exercise such authority;[479] and (5) would eschew reference either to the consequences (whether good or bad) of adherence to original understanding or to flexibility in response to feedback about consequences in favor of a rigid adherence to that original understanding.[480]

Bureaucracy is not plausible under such a regime. This claim may at first appear surprising; it is the popular hallmark of the bureaucrat

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relatively concrete and confined meanings (supplied particularly by a belief in the determinate character of the meaning of language) and to believe in the possibility of deduction from such rules. *See supra* text accompanying notes 50-54. However, it is not necessary to even an extreme version of the "traditional theory" as that label is used here that the person adopting it believe naively either in the capacity of statutory language to control decision or that courts are or should be merely passive conduits for legislative "will." *See, e.g.*, Easterbrook, *supra* note 385. Indeed, it is not necessary to traditional theory that common law method yield general rules or principles rigidly applied. It would be permissible for that method to be characterized as entailing particularized and fact dependent judgments. *Compare* Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249 (1980) (attacking pragmatic resolution of particular cases and favoring adjudication by reference to general rules or principles) *with* Stone, *From Principles to Principles*, 97 L. Q. REV. 224 (1981) (Atiyah's pragmatism is a process of formulating new principles). What *is* necessary to the understanding of traditionalism invoked here is a belief that an exercise of governmental power, including judicial power, must, if it is to be justified by reference to a statute, be derived from a relatively concrete expression of legislative judgment. This of course leaves open the possibility of alternative justifications, most obviously the principles of common law that would be controlling in the absence of a claim that a statute has relevance to a case. If one believes that these principles generally favor private ordering, or are compatible with individualistic liberalism as classically conceived, *see* R. EPSTEIN, *supra* note 247; F. HAYEK, *supra* note 31, at 148-61; or are economically efficient, *see* Easterbrook, *supra* note 385, the consequence is a position that so confines justifications of the exercise of governmental authority that it precludes administrative law as we know it.

[476]*See, e.g.*, Kelsen, *The Pure Theory of Law, Part II*, 51 L. Q. REV. 517 (1935); A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 183-203 (1915).

[477]*See, e.g.*, Easterbrook, *supra* note 385; Pound, *Spurious Interpretation*, *supra* note 385.

[478]*See, e.g.*, TVA v. Hill, 437 U.S. 153 (1978).

[479]*See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[480]*See, e.g.*, TVA v. Hill, 437 U.S. 153 (1978).

that he is an inflexible adherent to bureaucratic rules and, therefore, a quintessential formalist. But this inflexible adherence, to the extent that it in fact accurately depicts bureaucrats, is a feature of bureaucracy's observed behavior, not a rationale for or legitimating theory of bureaucracy.[481] Viewed institutionally, governmental bureaucracy could not survive in a formalist's legal world for two reasons: (1) The legitimacy of bureaucracy as an institution would be suspect, because broad delegations of rule making authority could not be traced to concrete legislative original understandings; and (2) the modern legitimating rationale for bureaucracy, that bureaucracies apply a flexible and pragmatic expertise to an evolving social, political and economic environment, would be suspect because the rationale is incompatible with all of the features of caricatured formalism noted above.[482]

Nontraditional interpretive theory legitimates bureaucracy in part, then, because it rejects the formalist obstacles to that legitimacy. There is, however, more to this matter than the mere removal of formalist obstacles. Nontraditional theory also legitimates by affirmatively asserting the moral imperative of an expanding, purposive, flexible and cybernetic law administered by institutions with open-ended authority.[483] Although it is true that the legitimating strategy of nontraditional authority is formally directed to courts as institutions, the reality is that most modern law, at least in volume, is bureaucratically formulated and applied. Courts, in interpreting and applying statutes, oversee a bureaucratic process. Moreover, courts are themselves transformed by the process nontraditional theory legitimates; they become bureaucracies both in the sense that their procedures become bureaucratized,[484] and in the sense that the interpretations they lay down have bureaucratic

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[481]The legitimating rationale for the administrative state is that agencies are staffed with experts capable of flexibly responding to rapidly changing social conditions and of engaging in experimentation. *See, e.g.*, J. LANDIS, THE ADMINISTRATIVE PROCESS 10-17, 98-99 (1938); Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L. J. 1487, 1495-1500 (1983). For an interesting critique of this and other rationales for bureaucracy *not* undertaken from an individualist perspective, see Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984).

[482]The general concern with administrative agency discretion, although it postulates alternative means of controlling that discretion, illustrates the incompatibility of the formalist stance with the administrative state. *See, e.g.*, Shapiro, *supra* note 481; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) [hereinafter Stewart, *Reformation*]; Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537 (1983).

[483]*See, e.g.*, B. ACKERMAN, *supra* note 293.

[484]*See e.g*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983); McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981); Vining, *Justice, Bureaucracy and Legal Method*, 80 MICH. L. REV. 248 (1981).

features.[485] Finally, although much of nontraditional theory purports to assign to courts the fundamental function of protection of individual rights as trumps of governmental policy, so that courts are viewed as counterweights to bureaucracy, it is not accidental that these rights are defined under it in a fashion compatible with the agenda of the "activist" state.[486] It is crucial to that agenda and to the preservation of such a state that courts eschew the limited, "reactive" role implied by formalism.[487]

Consider the typical post-New Deal regulatory scheme. Such regulatory schemes are characterized by a broad mandate to an administrative agency. The mandate often compromises contending political positions in the enactment process by declining to establish a concrete program. The administrative agency is to produce the program by absorbing contending political forces within a bureaucratic process.[488] Despite lip service to nondelegation doctrine and even an occasional

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[485]Much commentary on the role of the judiciary in the context of administrative law conceives of courts as relatively passive mediators between bureaucratic agendas and "fundamental values," so they have the task of, for example, controlling administrative discretion. *See, e.g.*, L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 569-75 (1965). This, however, understates the judicial functions actually assumed. Courts are not mere passive mediators; they are actively engaged in establishing and furthering bureaucratic agendas and in adjudicating polycentric disputes between multiple interests. *See, e.g.*, Chayes, *supra* note 484; Mashaw, *supra* note 176. This does not mean that there has been but a single, uniform tendency; the extent to which the courts have assumed activist roles has varied. *Compare* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (activist judicial review of rulemaking) *with* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (passive judicial review of rulemaking). *See* Chayes, *The Supreme Court 1981 Term Forward: Public Law Litigation in the Burger Court*, 96 HARV. L. REV. 4 (1982); Damaska, *Activism in Perspective*, 92 YALE L.J. 1189 (1983).

[486]*See* Mashaw, *supra* note 176. It is important to recognize that the claim made in the text disputes the standard position that courts are institutions independent from the administrative state and charged with the responsibility of preserving the fundamental principles of the legal fabric from the intrusions of that state. Professor Dworkin, for example, advocates a version of that standard position in sharply distinguishing principle from policy. *See, e.g.*, DWORKIN, RIGHTS, *supra* note 29, at 22-28. Although the traditional view would support the standard position as a claim about what courts should do (via the device of relatively narrow construction of the scope of a statute), *see* Easterbrook, *supra* note 385, the claim in the text is that courts have in fact largely become integral actors within the administrative state, engaged in a process of establishing and furthering its agenda, despite occasional rear guard actions in keeping with the standard position. More importantly, the claim in the text is that nontraditional theory legitimates this phenomenon. *Cf.* M. SANDEL, *supra* note 166, at 135-47 (Professor Dworkin's position so narrowly construes rights as to justify an expansive utilitarianism).

[487]*See* B. ACKERMAN, *supra* note 293.

[488]*See, e.g.*, Stewart, *Reformation*, *supra* note 482, at 1676-77; Shapiro, *supra* note 481, at 1505-07.

judicial recognition that the scheme enacts no clear resolution,[489] the general tendency has been to uphold such schemes.[490] In short, the typical regulatory scheme enacts abstract purposes and instructs the agency it creates to go forth, do good and avoid evil. The role of courts in the post-New Deal era has not been merely that of validating delegation of legislative authority, or of experimenting with administrative process to curb bureaucratic discretion. The courts have also gone far in establishing the substantive content of "doing good."[491]

It has been the contention here that Title VII is not the typical regulatory scheme, viewed, at least, from the perspective of a traditional stance. However, the methodology by which the Court has approached Title VII has transformed the statute into a bureaucratic instrument compatible with an activist model of the state. The difference is that it is the courts, rather than an expert agency, that have supplied the major element of the enforcing bureaucratic structure under Title VII. Consider, for example, the Court's elevation of the EEOC, an agency without congressionally conferred rule-making authority, into a *de facto* rule-making agency whose rules, however, are judicially applied selectively. The agency's rules are utilized as legitimating arguments when judicially applied; the rhetoric of bureaucratic expertise is employed as justification for a regulatory agenda constructed by the courts.[492] Consider also, the long tendency of the lower federal courts, only recently impeded by a shifting majority on the Supreme Court, to employ class action procedures as an instrument for implementing rather radical changes on a mass scale in employment procedures.[493] The form and scope of impact of such procedures is bureaucratic in the sense that they permit a thoroughgoing restructuring of social practices and

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[489]*See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981).

[490]*See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[491]Much administrative law commentary treats this process as a matter of controlling agency discretion, thus suggesting a judicial role of reaction to agency initiatives. *See* Stewart, *Reformation*, *supra* note 482; Shapiro, *supra* note 481; Rabin, *Legitimacy, Discretion, and the Concept of Rights*, 92 YALE L.J. 1174 (1983). Nevertheless, judicial reaction often establishes the substantive content of regulation and does so not merely by confining that content. *See*, note 485 *supra*.

[492]*See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 430 (1975).

[493]*Compare* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) *with* General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982). It is of course possible to view the Supreme Court's limitation of the class action device as a backing away from the bureaucratization theme and as a partial return to a more traditional stance on the permissible scope and character of adjudication. It is, however, also possible to view the phenomenon as abandonment of a device no longer needed, as the objectives of employing the device have been satisfied. *See* Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 INDUS. REL. L.J. 313 (1984).

a means of accommodating multiple, contending interests. Consider, finally, the Court's liability theories and affirmative action theories. If the analysis of this article is correct, these constitute not a "reactive" scheme for adjusting disputes within a regime of private ordering, but an "activist" effort to redistribute employment through systematic reordering of private incentives. Indeed, the thrust of this discussion is that the Court has converted a statute that, when viewed from a traditional perspective, conferred a limited individual right within a regime of private ordering of employment into a statute that, when viewed from a nontraditional perspective, is an engine to achieve a particular end-state: a fair distribution of employment among race and gender groups.

V. Conclusion

The claim that the Court has bureaucratized Title VII should not be surprising. It is intimately related to the earlier claims made here that the Court has recognized a group right and de-emphasized the individualist conception of the antidiscrimination principle.

The individualist conception, the account of original legislative intent provided above, and the conception of the function of courts as limited to enforcement of privately formulated arrangements or to the reactive correction of deviations from governing norms are related. All are aspects of a legal landscape that emphasizes, indeed is premised upon, notions of the value of individual autonomy, the primacy of private ordering and of the skepticism about the capacity of government to define, let alone to effectively implement, the public good. The role of a court in confronting a statute is, on these premises, the highly limited one of enforcing original understanding and, therefore, of confining the statute's operation and impact on private ordering to that understanding. At most, that role might extend to mediating legislative design, any administrative structure created to implement the design, and the pre-existing and privately ordered state of affairs originally confronted by the legislature. Viewed from the baseline of this landscape, Title VII created and authorized enforcement merely of a limited individual entitlement. As the political justification for the Civil Rights Act at the time of its enactment was premised upon individualist norms, it is not surprising that both the text and legislative history of Title VII comport with this assessment.

There is, of course, an alternative landscape, one that has generally eclipsed its competitor. The alternative has been variously labeled "constructivist,"[494] "activist"[495] and "statist."[496] Its features are: (1) use of

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[494]B. Ackerman, *supra* note 293, at 72.

[495]*Id.* at 1.

[496]Mashaw, *supra* note 176, at 1131.

governmental authority to order society in service of a publicly defined good; (2) implementation of this project through the rationalized processes of bureaucracy; (3) the blurring of private-public distinctions through the interrelated and interdependent character of private activity and bureaucratic processes and agendas;[497] and (4) a conception of courts not as enforcers of limited original understanding and not as merely mediators between public and private realms or between the legislature and the bureaucracies, but as prime actors both in establishing and in monitoring bureaucratic agendas.

Viewed from the perspective of this alternative landscape, Title VII's purpose of enhancing distributive equality is properly viewed as its meaning, for that purpose is both compatible with the expanded version of governmental function expressed in such a landscape and with a meaning subject to the implementing bureaucratic process implicit in that landscape. Moreover, recognition and enforcement of a group right is compatible with, perhaps is inherent in, the alternative landscape. Groups do not have rights in the sense of trumps of governmental interests or of private actions, but rather, in the sense of expressions of underlying, and overriding, governmental policy. The group is the administrative unit both of measurement and of implementation in an "administrative state."[498]

It may be said that this is putting the matter too strongly. An accurate depiction of the law of Title VII would not treat it either as expressing a "perpetrator" (individualist) perspective or a "victim" (bureaucratic) perspective,[499] but as an uneasy accommodation of both.[500] The law of Title VII (like, perhaps, American law generally) is more accurately characterized by oscillation between incompatible alternatives (or by "contradiction") than by a claim that it exhibits merely the characteristics of an "activist" or "statist" conception. There is much to be said for this view; it is a version of the claim earlier made here that Title VII is incoherent.[501] Moreover, it is a view supportable by reference to the rationalization that the group rights aspects of the Court's doctrine can be conceptualized as a strategy of overenforcement of the disparate treatment prohibition.[502] The claim

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[497]There is in addition a phenomenon, independent of governmental compulsion, of private adoption of bureaucratic forms of organization. *See generally* O. WILLIAMSON, MARKETS AND HEIRARCHIES (1975).

[498]Mashaw, *supra* note 176, at 1153.

[499]*See* Freeman, *supra* note 2, at 1052.

[500]*Cf.* Damaska, *supra* note 485 (rejecting claim that American law can be explained by statist model and arguing that it is instead a complex combination of centralized and decentralized features).

[501]*See supra* text accompanying notes 154-65.

[502]*See supra* text accompanying notes 271-367.

that Title VII has been bureaucratized is not, however, dependent upon a finding that it has been wholly and coherently bureaucratized. The Court's interpretations have rendered it both incoherent and a chief example of the departure of the current legal landscape from the rhetorical individualist ethic often employed to legitimate it.

The difficulty is that bureaucracy, and the view of government and court that underlies it, has been imposed upon a statute that both expresses and is symptomatic of an individualist ethic. Distinct and incompatible ideologies therefore coexist in uneasy tension. The consequence is compromise, an unstable complex of legal norms that can legitimately be explained either as an instance of bureaucratic implementation of a state policy of redistribution (a group rights regime), or as an instance of judicial overenforcement of disparate treatment (a partially individualist regime). This consequence satisfies neither side of the debate between these ideologies. From the perspective of advocates of redistributive equality among groups, the compromise is an inadequate, indeed hypocritical instance of the perpetuation of racism and sexism.[503] From their perspective, such advocates are correct: it is unlikely that the compromise will substantially affect the phenomenon of the minority underclass both because it incorporates elements of meritocratic individualism that render it largely irrelevant to that underclass, and because the appropriation and redistribution of wealth necessary to any near-term elimination of the underclass is not contemplated by the compromise.[504] From the perspective of advocates of individualist ideology, the compromise is an impermissible denial of the ideal premised upon an alien conception of governmental functions. From their perspective, the individualists are also correct: the compromise recognizes and enforces a group right, understood as a redistributive policy of government, even if the limited character of this policy results merely in tokenism.

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[503]*See* Freeman, *supra* note 2.

[504]*See* Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

Essay

Market Philosophy in the Legal Tension Between Children's Autonomy and Parental Authority

ROBIN PAUL MALLOY*

I. INTRODUCTION

The family represents a small subunit of a greater community and society. While the family is a unit of social organization it, like the larger community and society, is made up of individuals. The individuals in the typical nuclear family are generally thought of as biologically related and they include a mother, a father, and two children.[1] Our discussion of family need not be so limited, however, and it can include larger or smaller families, single parent families, extended families, or even unrelated individuals that live together with a common bond such as to be a family in every way other than by way of immediate biological connection.[2]

The significant feature of the family, for this Essay, is to focus on it as a model or method of social organization. In this respect, the family can be studied as a mini-society in order to learn more about how certain political, economic, and legal relationships affect individuals. More specifically, the family can be viewed as a social arrangement in which parents are typically empowered with the authority to oversee or control much of the life and "liberty" of their children. Consequently, in the absence of "outside" interference, the personal autonomy of the child is, relatively speaking, nothing more than a function of how much

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[1]For some background on the demographics of the family, see U.S. Dept. of Health and Human Services, THE STATUS OF CHILDREN, YOUTH, AND FAMILIES 1979 1-28 (1980) (demographic and economic trends); Urban Land Institute, DEVELOPMENT TRENDS 1986 5-8 (1986) (demographic trends in households that affect the economy and the family with respect to real estate activities); K. SNAPPER & J. OHMS, THE STATUS OF CHILDREN 1977 1-46 (1977).

[2]There are many ways to define the "family." *See* OECD, CHILD AND FAMILY DEMOGRAPHIC DEVELOPMENTS IN THE OECD COUNTRIES 75-78 (1979) (definitions used by different countries to compile their information).

freedom the parent is willing to allow.[3] In this sense the personal autonomy or individual liberty of the child is on the same footing as that of the slave; a good master might treat his slaves well and respect their human dignity, whereas a bad master might not. Additionally, the child, like the slave, enjoys a certain degree of autonomy or liberty only as a result of the parent's or master's benevolence; having only the most minimal claim in their own right, they are dependent upon the continued good nature of those who exercise power over them and they are expected to show gratitude and respect to these authorities when treated in anything less than a harsh or cruel manner.

This situation, I suggest, is the result of the family's insulation from competitive market forces for alternative social arrangements. Furthermore, legal efforts designed to interfere with the totalitarian potential of parental power are, in fact, efforts to interpose simulated market effects in a setting where no effective market exists.

Given this bent on market philosophy, this Essay will seek to examine the legal tension in the conflict between children's autonomy and parental authority. The Essay will progress through a series of subtopics consisting of discussion concerning: (1) the nature and scope of individual liberty, (2) market theory and counterbalancing power sources as a means to greater liberty, (3) legal interference in the parent-child relationship, (4) the implications of legal interference, and (5) concluding observations.

II. The Nature and Scope of Individual Liberty

To understand the issues of children's autonomy one must examine the contours of individual liberty. Individual liberty refers to a view of social relationships that provides for a sphere of personal autonomy or self determination over one's own thoughts and actions free from outside coercive interference.[4] This sphere of personal autonomy is not limitless, however, and the concept of individual liberty embodies within it a

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[3]This conception is similar to the way in which Richard Posner has viewed the rights of the poor. He asserts that the poor have no claim to economic resources except to the extent that they are part of the utility function of someone with wealth. *See* R. Posner, The Economics of Justice 76 (1983). For criticism of Posner's approach, see Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner, and the Philosophy of Law and Economics*, 36 Kan. L. Rev. 210-59 (1988) [hereinafter Malloy, *Adam Smith*]. *See also* Posner, *The Ethics of Wealth Maximization: Reply to Malloy*, 36 Kan. L. Rev. 261-65 (1988); Malloy, *The Merits of the Smithian Critique: A Final Word on Smith and Posner*, 36 Kan. L. Rev. 266-74 (1988).

[4]*See* F. Hayek, The Constitution of Liberty, 12-13 (1960) [hereinafter Hayek, Constitution]; M. Friedman, Capitalism and Freedom 14-21 (1982) [hereinafter Friedman, Freedom].

respect for the liberty of others.[5] Coercive interference results when the environment or circumstances of an individual are controlled by another to the extent that, "in order to avoid greater evil, [one] is forced to act not according to [one's own designs] but to serve the ends of another."[6] This coercion is "evil precisely because it thus eliminates an individual as a thinking and valuing person and makes him a bare tool in the achievement of the ends of another."[7]

The social organization of the family makes it a prime setting for the exercise of coercive interference by some individuals against the fulfillment of individual aspirations and liberty on the part of other individuals. While this coercive interference can occur between spouses, the focus of this Essay is on the relationship between the parents and the children within the family. Consequently, discussion will concentrate on four primary sources of power available to parents in exercising effective coercive interference and authority over their children.[8] The four sources that empower parental authority are: physical, economic, mental, and legal.

In the family relationship, it is generally true that the parents are physically stronger than their young children and teenagers. This allows the parents to exercise raw power over their children based on the mere presence of superior physical strength. The child that refuses to respond or adjust behavior to the wishes of the parent can be picked up, hit, or restrained without much concern for effective physical retaliation from the child.

Like physical power, the parents almost always exercise superior economic power over their children. The wealth and income for the family is generally provided by the work efforts of one or both parents, and it is their control over the family wealth that determines how scarce resources will be allocated within the family.[9] The power to control expenditures for food, clothes, education, medical care, and leisure are tremendous weapons of potential coercion within the family.

Age, experience, education, and physical development generally give the parents superior mental power over their children. Even parents that would never dream of using physical force against their children will generally succumb to the use of superior reasoning power and mental manipulation of their children in order to coerce certain "desirable"

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[5]*See* L. Von Mises, Human Action 179-87 (2d. ed. 1963); Hayek, Constitution, *supra* note 4, at 11-21; Friedman, Freedom, *supra* note 4, at 14-21.

[6]*See* Hayek, Constitution, *supra* note 4, at 20-21.

[7]*Id.* at 21.

[8]For an interesting book on the general subject of power, see J. K. Galbraith, The Anatomy of Power (1983).

[9]Even in the family dependent upon welfare benefits, the benefits are received or controlled by the parents.

behavior. The ability to use such mental strategies against the child is a major source of parental power.

In addition to physical, economic, and mental sources of power, the parent-child relationship is affected by legal rules that both empower the parents and disempower the children. The law empowers parents by giving them legal responsibility for the care of their minor children.[10] In assigning this responsibility, the law recognizes the authority of the parent to exercise a great deal of control over the everyday choices available to their children. The children cannot, for instance, complain about the religious beliefs imposed upon them by their parents, nor can they have legal recourse against their parents for bad taste in selection of clothing, nor in the choice of attending private or public school, nor in the granting or refusing of permission for the children to participate in certain extracurricular activities.

While the law empowers parental authority, it simultaneously "disempowers" children. It "disempowers" children by reducing their ability to find refuge from parental authority by appealing to outside sources of alternative or counterbalancing power. For example, child labor laws and minimum wage laws prevent or reduce the ability of children to enhance their own sources of economic power.[11] Likewise, the legal impairments to the enforceability of a contract against a minor makes it difficult for children to make alternative arrangements for the exercise of their own choice preferences free of the choice preferences indulged

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[10]*See, e.g.*, S. Maidment, *The Fragmentation of Parental Rights*, 40 CAMBRIDGE L.J. 135 (1981) (This article discusses the rights of parents in English society and identifies twenty commonly accepted rights and duties: (1) right to physical possession; (2) right to access (visit); (3) right to determine education; (4) right to determine religion; (5) right to domestic services (compensation for interference with parental rights); (6) right to discipline child; (7) right to consent to marriage between sixteen and eighteen; (8) right to consent to medical treatment under sixteen; (9) right to veto issue of passport, and give consent to emigration; (10) right to administer child's property; (11) right to succeed to child's property on death; (12) right to appoint a guardian; (13) right to agree to adoption; (14) right to object to local authority assumption of parental rights (under British law—Child Care Act 1980, s.3); (15) right to consent to change in child's surname; (16) right to represent child in legal proceedings; (17) duty to secure education up to sixteen; (18) duty to protect; (19) duty to maintain; (20) duty to represent child in legal proceedings. *Id.* at 136-137). For a view from the perspective of children's rights under American law, see R. HOROWITZ & H. DAVIDSON, LEGAL RIGHTS OF CHILDREN (1984) [hereinafter HOROWITZ, CHILDREN]. For an early, yet interesting, work on the rights of parents, see generally J. COHEN, R. ROBSON & A. BATES, PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW (1958).

[11]*See generally* HOROWITZ, CHILDREN, *supra* note 10, at §§ 8.02-8.09 (1984) (concerning child labor laws); W. BLOCK, DEFENDING THE UNDEFENDABLE 247-56 (1976) [hereinafter BLOCK, UNDEFENDABLE] (dealing with children and the employment setting); H. HAZLITT, ECONOMICS IN ONE LESSON 134-39 (1979) (discussing minimum wage jobs); M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE 237-38 (1980) (minimum wage laws).

in by their parents.[12] Finally, the laws concerning kidnapping, child abuse, the corruption of a minor, and interference with the parent-child relationship are such as to discourage outsiders from assisting children in an exercise of will against the wishes of their parents in all but the most clear and outrageous situations of parental child abuse. This "chilling effect" on outsiders results from being unable to assess their own risk of serious legal consequences from the variety of potential legal charges that might be levied against them when they try to step into the midst of the parent-child relationship.

A tragic consequence of the above-described power arrangement is that children living in less than desirable family situations may see their only choices as being to stay put and live in their unhealthy environment or to join the growing number of children living on the street or on their own in a society that denies them access to legitimate employment.[13]

III. Market Theory and Counterbalancing Power Sources as a Means to Greater Liberty

Market theory, and its ability under democratic capitalism to foster counterbalancing power sources, provides a conceptual analogy for considering the problems of parental coercion in the family setting.[14] An important problem confronting the social organization of the family is that it represents an instance of situational monopoly wherein the parents are empowered to exercise substantial control over the "market" which is the home environment.[15] The home environment is a market in the

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[12]*See generally* E. A. Farnsworth, Contracts 216-25 (1982) (discussion of the law concerning a minor's ability to contract).

[13]*See* U.S. Dept. of Health and Human Services, FY 1983 Annual Report to Congress on the Status and Accomplishments of the Centers Funded Under the Runaway and Homeless Youth Act VI (1983) (The Department estimated that the number of runaway youth, ages 10-17, ranges from 733,000 to over one million). A related matter seems to be the scope of child abuse in American families. "According to the American Humane Association, the number of official reports of child abuse and neglect has risen 233 percent nationally since 1976. There were 2 million reported cases in 1986 . . ." B. Kantrowitz, P. King, D. Witherspoon & T. Barrett, *How to Protect Abused Children*, Newsweek, Nov. 23, 1987, at 70. "Officially, 1,200 children died of abuse last year; some experts say, however, that the true figure is probably closer to 5,000." *Id.* at 70.

[14]For a discussion of how capitalism serves individual liberty, see Friedman, Freedom, *supra* note 4; Malloy, *Adam Smith*, *supra* note 3; Malloy, *The Political Economy of Co-Financing America's Urban Renaissance*, 40 Vand. L. Rev. 67, 95-132 (1987) [hereinafter Malloy, *Political Economy*]; Malloy, *Equating Human Rights and Property Rights—The Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, 47 Ohio St. L.J. 163, 168-71 (1986) [hereinafter Malloy, *Human Rights*].

[15]In essence the family setting presents a special situation of monopoly wherein the

sense that it represents a community that must share valuable scarce resources including housing space, food, clothes, educational opportunities, medical care, and recreation, among others. Since these choices are usually not priced within the family setting, it rèpresents a market that must function without pricing information as a proxy for assessing the various trade-offs to be made. Consequently, choices within the family concerning the allocation of scarce family resources must be made by mutual agreement or, more specifically, by appeal to the desires and choice preferences of those exercising the power of resource allocation. From the discussion in the earlier part of this Essay, it is clear that the market within the home is dominated by the parents, and in this sense the children must learn to live in a situation of monopolistic parental power.

In the non-family setting our society has generally looked to government as a primary means for protecting individuals from private coercive interference and this is especially true in situations of market monopoly.[16] Government even in the non-family setting, however, cannot be given unchecked power to protect individuals from outside coercive interference for this could, itself, cause government to become an even greater threat to individual liberty than that posed by any individual or private group. As a consequence, steps must be taken to restrict governmental action through a system of general rules and principles.[17] Such rules and principles must provide a framework for ensuring human dignity and the opportunity for individual fulfillment to every person in the community.[18] At the same time, these rules and principles must allocate power within government and as between government and private parties so as to maintain the sort of limited government that is necessary to avoid statist totalitarianism. Of key importance to this social arrangement is the presence of a capitalist market structure that allows

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parents exercise the power of a monopolist. For general reference on monopoly in the market setting, see generally FRIEDMAN, FREEDOM, *supra* note 4, at 119-36 (discussing the problems of monopoly power and social responsibility); R. LIPSEY AND P. STEINER, ECONOMICS (4th ed. 1975); A. ALCHIAN & W. ALLEN, EXCHANGE & PRODUCTION (3d ed. 1983); P. WONNACOTT & R. WONNACOTT, ECONOMICS (1979).

[16]*See* HAYEK, CONSTITUTION, *supra* note 4, at 11-21. Within the confines of a free society the state can be a legitimate collective vehicle for protecting the individual's liberty from the coercive interference of others. *Id. See also* F. HAYEK, THE ROAD TO SERFDOM 82-83 (1944). The idea of government as a protector of individual freedom, however, does not mean that whatever the government does in the name of this protection is to be considered proper. Hitler may have gained power and acted in a strictly constitutional manner, but this would not make his rule "right." *Id.*

[17]*See* Malloy, *Adam Smith*, *supra* note 3, at 229-38; Malloy, *Political Economy*, *supra* note 14, at 112-33.

[18]Malloy, *Political Economy*, *supra* note 14, at 112-33.

diverse individuals to control significant assets independently of the state, thereby serving as a counterbalancing source of private power against the state while the state itself serves as a check on potential abuse by powerful individuals or organizations.[19] It is this complex network of viable alternative and counterbalancing power sources that best protects individuals from the complete discretion and potential despotism of monopolistic power in the non-family marketplace.

The family, when viewed as a mini-marketplace, is similar to a situation of market monopoly. In this sense, the family takes on an almost totalitarian tinge because there are few, if any, effective sources of counterbalancing power capable of penetrating the family relationship. This problem, it seems, is exaggerated when a culture moves, as ours has done, to the smaller nuclear family. The reason for this is that the extended families of the past included multiple adult figures that would have access to information about the children's home environment while also having sources of power that might be used to interfere with the exclusive power of the parents. In response to this situation, government presents itself as a means for reducing the potentially harmful effects of monopoly by altering the division of power and resources between the parties involved. Thus, governmental interference in the relationship between individual family members can be seen as similar to the attempts of government to correct for monopolistic power arrangements in the non-family setting. Likewise, government intrusion in both the family and non-family marketplace requires a recognition that the government intrusion itself cannot be limitless if individual liberty is to be preserved.

IV. Legal Interference in the Parent-Child Relationship

One way in which to view legal attempts to counterbalance the potential for parental abuse of power is to consider them as efforts to simulate market forces in a setting of market failure. Laws designed to protect children or to empower children can be viewed as societal efforts to penetrate the inner sanctum of family life in an attempt to impose outside influences upon the social organization of the family. That is, legal interference can be viewed as an effort to establish counterbalancing power sources within the family as a means of creating a competitive market environment. This competitive market environment could provide individual family members with greater choice and individual autonomy in much the same way that the existence of competing sellers of consumer products is said to provide greater choice in the non-family marketplace.

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[19]*See* Friedman, Freedom, *supra* note 4, at 7-21. *See also* Malloy, *Human Rights*, *supra* note 14, at 168-77.

Acting through the vehicle of law, society can thus regulate the family market within the home at least to the extent that it eliminates certain parental preference choices from the available alternatives. Laws preventing child abuse eliminate the parental choice of denying food or shelter to a child as well as putting some limitation on the amount of physical or mental abuse that can be directed towards a child. Likewise, laws requiring mandatory schooling limit the choices available to parents with respect to the provision of educational opportunities. In addition to these examples of legal restraint on parental preferences, the law also provides measures for empowering children through affirmative obligations. Examples here might include the obligation of public schools to provide sex education courses for children without regard to parental consent or objection.[20] Likewise, the law has recognized the right of a teenage girl to decide for herself on the issue of an abortion without the need of obtaining parental consent to the procedure.[21]

In each of these situations, the legal interference with the parent-child relationship can be viewed as similar to governmental interference with monopoly power in the business world or with governmental attempts to correct perceived market failures. These areas of governmental interference also involve another issue, however, and that is the threshold issue of determining when the government should or should not act. This threshold issue in non-family matters can involve the question of what size businesses should be required to engage in certain reporting or compliance procedures covered by a governmental regulation. Likewise, the laws governing the grounds for governmental intrusion might include multiple exclusions and exemptions from coverage. Similarly the intrusion by government into the parent-child relationship involves the very difficult threshold question of when children are mentally and physically capable of exercising the degree of autonomy that the government seeks to assure them.[22] In other words, the determination that all children should have access to sex education, contraceptives, and abortion services does not answer the threshold question of when, at what chronological time in their life, they should be assured such access.

The answer to this threshold question regarding age of access is beyond the scope of this Essay, but it seems that one of two primary

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[20]*See* HOROWITZ, CHILDREN, *supra* note 10, at §§ 12.01-48.

[21]*See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1337-61 (2d ed. 1988) (discussing the abortion issue—in particular pages 1344-45 relate to the rights of a teenager) [hereinafter TRIBE, CONSTITUTIONAL].

[22]*See* B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 107-24, 140-67 (1980) (pages 107-24 relate to the family and parental power; pages 140-67 relate to education—the "liberal" approach); BLOCK, UNDEFENDABLE, *supra* note 11, at 247-56 (discussing a child's "autonomy" in the work setting).

approaches might be taken when considering the legal response to this issue. The first approach would be to seek an administratively easy test that simply establishes an age at which certain claims by a child would be recognized without detailed inquiry as to the actual capabilities of the child. For instance, the law may simply say that a child at least sixteen years of age can work in certain types of businesses, or an eighteen year-old can vote in political elections, or a twelve year-old can consent to sexual intercourse (usually done in the negative by establishing the age under which sexual intercourse will be treated as statutory rape.) In contrast to this "bright line" approach, an attempt could be made to establish legal criteria for demonstrating the requisite mental and physical attributes deemed necessary for exercising personal automony. This approach would be more difficult to administer and would result in different children exercising autonomous decision making at different chronological ages. Importantly, implementation of either approach would require lawyers to rely heavily on the research and input of many other disciplines.

V. Implications of Legal Interference

There are several important implications of legal interference in the parent-child relationship. The three most important implications involve issues of diversity, statism, and discipline.

The first implication to consider involves diversity. When law is used to empower children, it may reduce cultural diversity while also reducing the beneficial consequences of family life. For instance, family life can have positive consequences for individuals and for society by preserving diverse cultural and ethnic values. In this sense, the family should be seen not only as having a key role in value training but also in maintaining the diversity of the greater society by preserving familial differences in cultural experiences that are closely linked to these values. However, the intrusion of law into the family can disrupt the process of transferring values from one generation to the next by enhancing the children's ability to reject familial customs and values in favor of current societal values and cultural norms. The societal values that intrude on family life can, therefore, be good in the sense that they present children with a choice, but they can also be bad in the sense that they undermine the parent's ability to pass on values and customs deemed worthy of preservation. To the extent that creativity, discovery, artistic, and productive capacity are enhanced by diversity in individual perspective, society may see a decline in these attributes as future generations become more homogenized in popular culture and less sensitive to their own unique heritage.[23]

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[23] *See generally* A. Bloom, The Closing of the American Mind (1987) (discussing similar problems of popular culture with respect to education).

Related to this issue of diversity is the problem of statism. While legal interference with family relationships can be seen as a beneficial attempt to simulate market forces, it can also be seen as an attempt to merely displace discretionary parental authority with authority exercisable by the state. In other words, governmental interference in the family relationship can be viewed in one of at least two different modes. First, law may be brought to bear on the problem in a genuine effort to protect and empower children. Second, law may be used as a means for merely enhancing state power and control over individuals by displacing the authority of parents with that of the state. The state, for instance, "steps" into the family relationship and announces when the children will be educated while also prescribing the curriculum and value-training that will make up their formal education.[24] Furthermore, the state and not the parents will set the guidelines for access to such controversial rights as the right to an abortion. In this regard, legal attempts to empower children can be viewed as mere attempts to indoctrinate children into values and customs set by the state rather than by their parents.[25]

A third and final implication of legal interference with family relationships concerns the matter of discipline. All complex relationships seem to require some degree of discipline. For the most part, discipline is centered around the effectiveness of self constraint based on internalized values and norms. Where one fails to properly conform to requisite norms and values, external reinforcement designed to correct for the breach of discipline generally exists. In the greater society, we have the police as an example of an enforcer against the undisciplined member of the community. In the family, one may experience "shunning" as a means of enforcing familial norms against the individual that has refused to conform to the expected values and norms of the group. In each setting one observes the role of and the apparent need for discipline when living in the community of others.

In the parent-child relationship the question of discipline follows the issues of diversity and statism. This is because society, having charged parents with the primary responsibility for child rearing and education, seeks at the same time to balance that mandate with a contrary mandate which limits the power of parents to enforce value-training through effective discipline. As an example, consider the devout Roman Catholic couple who teaches their daughter to abstain from sexual intercourse until marriage. Their value-training is undercut by laws empowering the

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[24]*See generally* Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 UNIV. ILL. L. REV. 15-95.

[25]*See generally id.*

child to make alternative choices and by a popular culture which, under protection of the first amendment, uses the media to send countless contrary messages on the subject.[26] As a consequence, the parents are not only undercut in their attempts to have their daughter internalize *their* values on the subject of sex, but their serious concern for a value deemed so contrary to legal and popular norms undercuts their authority and credibility in other areas as well. Without regard to the value in question, for there is probably at least one such value for every parent, the point is that the counterbalancing effort to empower children makes it that much more difficult for parents to discharge their responsibility for child rearing and education.

Unfortunately, having created a process for ongoing tension between the child and its parents, our society often provides very little help for those having difficulty with the human realities of confronting these often emotional and deeply personal conflicts in the family relationship.

VI. Concluding Observations

This short Essay probably raises more questions than it could ever hope to answer. Nonetheless, the effort has been to suggest at least one useful conceptual framework for viewing family relationships. Such a framework, for instance, allows one to consider the problems of children growing up in an abusive family environment. For these children, the family home becomes a prison insulated from the scrutiny of the outside community and within which the power of the parents rules supreme. Temporary excursions into the world beyond the family, such as attending school or visiting friends, do little to release the children from their abusive environment or to expose it to others. Ultimately there is always the need to return to the home at night and deal with the same parental problems the next day. Understanding the family relationship in this way helps one to see that governmental interference with family relationships will likely be of only marginal importance given the presence of a situational monopoly that makes it almost impossible for the children to be assured of long-term care and protection outside the home environment. Furthermore, piecemeal legislation intended to empower children in some respects, while other legislation simultaneously "disempowers" them, ends up being no substitute for a properly func-

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[26]By this I simply mean that the first amendment protects various speech messages that many parents might find objectionable. This does not mean that first amendment protection is bad, it is merely meant to show that it provides a source of empowerment for alternative viewpoints and some of these viewpoints may come into conflict with the views and values that parents deem important to the family. *See generally* Tribe, Constitutional, *supra* note 21, at 785-1061.

tioning marketplace and provides children with no real choice or autonomy in their family life. The best that governmental interference can hope to achieve is a marginal reduction in outrageous physical abuse of children (mental abuse is harder for outsiders to detect), and a questionable ability to offer children information on alternative lifestyles, although it is unclear that the government's current choice of lifestyle alternatives offers any positive value to the individual (I suggest that it principally reflects the political agenda of a particular segment of the community rather than a significantly beneficial enrichment for the individual child).

As a consequence, the market philosophy framework lets one look at the family in a unique way: to expose its monopolistic and totalitarian tendencies.[27] This, it seems, is useful because it provides a means for considering the problems confronting children while also providing a conceptual basis for evaluating the potential consequences of various legal efforts to restructure the parent-child relationship.[28] Unfortunately, here as elsewhere, the market analysis fails to answer the underlying problem of defining the moral worth, human dignity, and individual liberty that rightfully attaches to every child and which society must protect.[29]

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[27]At the same time, such a view of the family lets one consider the potential problems of organizing a greater part of society along the same monopolistic and totalitarian power lines as that of the family. In other words, a statist ideology can lead to societal consequences similar to those outlined in this Essay concerning the family.

[28]My market perspective in this area is admittedly the outgrowth of my own personal and subjective life experience. Having grown up in a large lower class family subject to the ongoing abuse of my alcoholic father, and having stood helpless in the presence of the abuse of my mother throughout my childhood, I have come to be suspicious of all concentrations of power. Consequently, I have always found the decentralized and individualistic character of the market metaphor to be appealing.

[29]I have tried elsewhere to deal with the general issue of how moral worth, human dignity, and individual liberty fit into a conception of law and economics. While my own ideas are still developing, I have approached this problem in other contexts as illustrated by general reference to Malloy, *Human Rights*, *supra* note 14; Malloy, *Adam Smith*, *supra* note 3; Malloy, *Political Economy*, *supra* note 14.

Notes

First Church Decides Compensation is Remedy for Temporary Regulatory Takings—Local Governments are "Singing the Blues"

An important United States Supreme Court decision in 1987 established a doctrine which affects thousands of determinations of local zoning boards and local legislative bodies throughout the country. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[1] the Court held that the Constitution requires governments to compensate landowners for temporary regulatory takings rather than allowing a court to merely invalidate the regulation.[2] Through amici briefs, government at all levels had opposed this outcome. Therefore, when the decision was made, government decisionmakers feared the door was open to numerous lawsuits that would either cost government millions or shut down regulation of land use. Developers and landowners, on the other hand, were jubilant.

The amount of government regulation of land use has grown over time. Two centuries ago, landowners were free to develop property as they pleased, unless the use constituted a nuisance or the landowner had entered into covenants restricting the property's use. But as the country became more populated and great cities emerged, the need to protect public health and safety through use of government's police power brought on regulation. Zoning as a valid exercise of police power was upheld by the Supreme Court in 1926.[3] Over the years, land-use regulation has grown and intruded on the private property rights of landowners in order to further the social, economic, and environmental needs of the community. In the last ten to fifteen years, landowners have begun to argue that these actions are confiscations of the owners' right to use their land.

Because *First Church* expands the meaning of the Takings or Just Compensation Clause,[4] it is considered a landmark decision. The Court had never before decided that compensation was the remedy for a

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[1]107 S. Ct. 2378 (1987).

[2]*Id.* at 2389. A temporary regulatory taking is a regulation that is declared by a court to be invalid as a taking for which the remedy is damages for the use of the property for the interim period between the date the regulation effected a taking and the date the court declared the regulation invalid. *See infra* note 59 and text accompanying notes 49-63, 91-96.

[3]Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[4]"[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V, § 1, cl. 5. The clause is referred to as both the Takings Clause and the Just Compensation Clause.

"temporary regulatory taking." Although the decision was narrow, it will have a profound psychological effect on lower court rulings, and on local land-use decisions. To already strapped local governments, the fear of the cost of compensating landowners for being found to have taken all use of the landowners' property may cause local decisionmakers to choose not to regulate when they would have prior to *First Church*.

The decision of the Court in *First Church* spoke only to the remedy issue; it did not specifically find in this situation that there had been a taking. Accordingly, the case was remanded for a determination of the taking issue. However, the major problem that remains is to ascertain the factors or the test for determining whether there has been a taking. The Court needs to resolve that and other issues. This Note examines the *First Church* decision as part of the evolution of the Takings or Just Compensation Clause and the effect of the decision on local planners and decisionmakers. The first section provides a context for the *First Church* decision, which is then analyzed in the second section. The third section presents what issues are yet to be resolved, including what constitutes a taking, whether alternatives in lieu of compensation may be substituted, when a taking begins, and whether a challenger must have a final decision and exhaust all state and local procedures for compensation before the challenge is ripe for adjudication. Because most land-use decisions are made at the local level, the final section focuses on the practical consequences to the local decisionmaker and planner, and concludes that government may still impose police power regulations to protect public health and safety within limits without fear of being required to compensate the landowner.

I. Introduction to Concepts

A. Why Property Rights Should be Protected

One object of American government is to protect the individual's accumulation of wealth as a way to encourage industriousness and productiveness. Another object is to promote the common welfare.[5] "The implication of this view is that property is to be protected only up to the bounds of some conception of civil and social responsibility."[6] The tension between these two philosophies of property helps explain the "takings" issue. Any court in deciding a takings case is determining how much to protect expectations of gain and the bundle of property

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[5]*See generally* Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561 (1984).

[6]*Id.* at 592.

rights (economic rights and legal relations) of an individual and how much to protect the community for the benefit of all (civic and social responsibility).

"Property rights" means both economic rights and legal relations. Economic rights include not only property in the sense of land and things, but also "new property," for example, entitlements, and other government benefits. The legal relations relevant to property include the rights "to use," "to manage," "to the income," "to the capital," and "to security."[7] These legal relations are subject to limitations such as the duty not to use the property so as to harm others.[8]

B. The Original Meaning of the Just Compensation Clause

Prior to the adoption of the United States Constitution and the Bill of Rights, the colonies frequently took private property for public use.[9] No colony, except Massachusetts,[10] paid compensation when it built a public road across unimproved land although the landowner was compensated for roads across improved land.[11] When James Madison drafted the Bill of Rights, although no state had requested it, Madison included a clause that provided for compensation on his own initiative.[12] Madison intended the clause "nor shall private property be taken for public use, without just compensation"[13] to have a narrow meaning, to apply only to the federal government and only to physical takings.[14]

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[7]A. HONORE, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107-47 (A. Guest ed. 1961). For a more complete formulation based on Honore's work, see Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 589-90 (1981). The Court in Ruckleshaus v. Monsanto Co., 467 U.S. 986, 1001-03 (1984), discusses the difficulty of defining property.

[8]For a list of limitations, see Oakes, *supra* note 7, at 589-90.

[9]According to the ideology of the revolution, such takings were justified to advance the common good. *See generally* F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE, 82-105 (1973) [hereinafter THE TAKING ISSUE]; Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L. J. 694 (1985) [hereinafter Note, *Original Significance*]. *See also* Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); Note, *Civil Rights for the Propertied Class: The Development of Inverse Condemnation in the Federal Courts*, 55 TUL. L. REV. 897, 900-01 (1981).

[10]*See* THE TAKING ISSUE, *supra* note 9, at 695 (quoting the original Mass. Const. Art. X (1780)).

[11]*See* Note, *Original Significance*, *supra* note 9, at 695.

[12]All other provisions in the Bill of Rights were requested by at least two states. E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 161-65 (1957) (listing the sources of the provisions of the Bill of Rights).

[13]U.S. CONST. amend. V, § 1, cl.5. This Amendment was adopted in 1791.

[14]Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). "[T]he fifth amendment must be understood as restraining the power of the general government, not as applicable to the states." *Id.* at 247. *See* Note, *Original Significance*, *supra* note 9, at 708.

The federal government did not take property for public use until 80 years later in the 1870's but prior to that state officials did condemn land for use by the federal government.[15] State governments could abridge property rights for public use in order to promote the common good, and it was the practice in several of the states to acquire land without compensation.[16] The Just Compensation Clause was made applicable to the states as well as the federal government through adoption of the fourteenth amendment in 1868[17] and by Supreme Court interpretation 29 years later in *Chicago, Burlington & Quincy R.R. Co. v. Chicago*.[18] Although the fourteenth amendment does not mention "just compensation," the Court incorporated compensation for physical takings through the Due Process Clause to apply to the states.

C. Antecedents to the Temporary Regulatory Taking of Land

In order to understand fully the decision the Court reached in *First Church*, it is necessary to briefly examine the evolution of "takings" and "just compensation" from the original meaning to quite different meanings today.

1. Eminent Domain and Just Compensation.—Federal, state, and most local government units have the power of eminent domain over property within their jurisdiction, power of a sovereign to condemn private property for public use without the consent of the owner.[19] Originally, the only meaning of the Just Compensation Clause was that the fifth amendment limits eminent domain power by requiring just compensation for property taken. Continuing to the present, when a private property owner refuses to sell property which the government wants for a public purpose, the government may condemn the property, provide the owner with just compensation, and take the property against the owner's wishes.[20] The government only need compensate if what is

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[15]Stoebuck, *supra* note 9, at 559 n.18.

[16]*See* 3 P. NICHOLS, EMINENT DOMAIN § 8.1[1] n.10 (3d ed. 1985).

[17]"No State . . . shall . . . deprive any person of . . . property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1, cl. 3.

[18]166 U.S. 226, 241 (1897). In other words, just compensation did not apply to the states for the first 100 years.

[19]1 P. NICHOLS, *supra* note 16, at § 1.11. *See generally* Stoebuck, *supra* note 9.

[20]Government can wait until the cost is established before making a decision to proceed with acquiring the property.

> Until taking, the condemnor may discontinue or abandon his effort. The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources.

Danforth v. United States, 308 U.S. 271, 284 (1939).

taken is private property; it need not compensate for collateral interests and expectations.[21] Just compensation in eminent domain has come to mean a fair market value standard of what a willing buyer would pay to a willing seller.[22] Although eminent domain may only be used to take private land for public use, the courts are liberal in determining what constitutes public use,[23] and the low-level of scrutiny test is whether the government's exercise of eminent domain power is rationally related to a conceivable public purpose.[24]

2. Inverse Condemnation and Physical Invasion.—The United States Supreme Court has not read the Takings Clause literally nor in its original meaning.[25] Rather, the Court has expanded the meaning gradually. From the eminent domain context, the concept of just compensation expanded into what is now called inverse condemnation. When government causes damage to privately owned real property by negligent acts, the owner may not have the ability to recover damages because the government may have sovereign immunity from tort liability. To avoid this inequitable result, plaintiffs converted the request for damages into a claim of attempted acquisition. However, the parallel to a tort cause of action remains, including compensation as damages and the need for proving causation.[26] By converting the property damage into an attempted

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[21]United States v. Willow River Power Co., 324 U.S. 499, 511 (1945) (claimant's interest in high water level to maintain its power head is not a right protected by law); United States v. General Motors Corp., 323 U.S. 373, 378 (1945) (the fifth amendment concerns itself with the physical thing and not with collateral interests which may be incident to ownership).

[22]United States v. Miller, 317 U.S. 369, 374 (1943). In a situation where market value is impossible to determine, other standards such as replacement, relocation or substitute costs will be considered. United States v. Fifty Acres of Land, 469 U.S. 24 (1984); United States v. 564.54 Acres of Land, 441 U.S. 506, 508-09 (1979).

[23]Berman v. Parker, 348 U.S. 26 (1954).

> Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.

Id. at 33.

[24]Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984). "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241.

[25]Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 142 (1978) (Rehnquist, J., dissenting), *reh'g denied*, 439 U.S. 883 (1978) ("Because the Taking Clause of the Fifth Amendment has not always been read literally, however, the constitutionality of appellees' actions requires a closer scrutiny . . . .").

[26]*See* Ragsdale, *A Synthesis and Integration of Supreme Court Precedent Regarding the Regulatory Taking of Land*, 55 UMKC L. Rev. 213, 219-22 (1987).

acquisition, plaintiffs could argue that the Takings Clause applies and is self-executing; that is, a property owner does not need to have statutory consent to recover from government as was necessary for a tort recovery. A landowner suing for property damages can claim that government has acquired the property without paying just compensation for it.[27] If the landowner prevails, government is forced to compensate the landowner, but in so doing, it will receive title to the property.

Physical intrusion or occupation of the land by government was essential in early cases.[28] Thereafter, the concept of taking by government action when the government damaged or intruded was expanded to include government burdening of the airspace above privately owned property causing damage to the owners' use of their property.[29]

The term "inverse condemnation" appeared in the 1960's.[30] It is called inverse because the landowner rather than the government institutes the proceedings for condemnation. More specifically, inverse condemnation is a cause of action against government to recover the value of property taken (the opposite of eminent domain under which government institutes a cause of action against the private property owner to take the land and the court determines the value of the property to be taken).[31]

3. Police Power Regulation.—Police power regulations are statutes or ordinances enacted by government (either state legislatures, or local councils, boards and commissions) which impose duties or limits upon those regulated in order to promote, protect and prevent harm to public interests in health, safety, order, morals and general welfare. A state is said to inherently have police powers because such powers were left to the states in our constitutional system.[32] A law duly passed by a state

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[27]*See* D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 24.3 (2d ed. 1986).

[28]Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (a dam constructed for flood control had caused land to be flooded that had not been purchased by the government).

[29]United States v. Causby, 328 U.S. 256 (1946). The Court held that U.S. aircraft flying in and out of a nearby Air Force base, thus rendering a chicken business unprofitable and preventing the owners from sleeping at night, was "as much an appropriation of the use of the land as a more conventional entry upon it." *Id.* at 264.

[30]*See* Bauman, *The Supreme Court, Inverse Condemnation, and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L. J. 15, 45 (1983).

[31]United States v. Clarke, 445 U.S. 253 (1980). Inverse condemnation is a "shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Id.* at 257.

[32]Thurlow v. Massachusettes, 46 U.S. 504, 527 (1847) (the License Cases). *See generally* R. ROTUNDA, J. NOWAK, & J. YOUNG, 2 TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE § 15.1 at 31 (1986). *See* Ragsdale, *supra* note 26, at 223.

legislative branch of government is valid unless it violates a provision of the United States Constitution or the state's constitution having to do with the rights of individuals or unless it interferes with a power allocated to the federal government by the United States Constitution.[33] If a regulation is not valid, the remedy is to invalidate the regulation.[34] Zoning became a judicially sanctioned police power early in the 1900's.[35]

4. The Blending of Two Different Doctrines, the Idea that the Taking Clause is a Restraint on Police Power.—The first suggestion that a police power regulation could be a "taking" of property under the fifth amendment came in 1887 in *Mugler v. Kansas.*[36] The Supreme Court rejected the argument:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. . . . The power which the States have of prohibiting such use by individuals of their property, . . . is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.[37]

In cases that challenged the use of police power to regulate land use, the Supreme Court employed substantive due process analysis.[38] The Court's rejection of the suggestion that a police power regulation could

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[33]The burden of proof is on the one challenging the law. *See* Cook, *What is the Police Power?*, 7 COLUM. L. REV. 322 (1907).

[34]Lake Shore & M.S.R. Co. v. Smith, 173 U.S. 684, 699 (1899).

[35]Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[36]123 U.S. 623 (1887) (owner of a brewery contended that a statute prohibiting manufacture and sale of intoxicating beverages was invalid under the Due Process Clause as a taking of property). *See infra* note 109 and text accompanying notes 108-17.

[37]*Id.* at 668-69.

[38]*See* Hadacheck v. Sebastian, 239 U.S. 394 (1915); *Euclid*, 272 U.S. 365; Nectow v. Cambridge, 277 U.S. 183 (1928). Today for substantive due process analysis in government actions which do not limit "fundamental" constitutional rights, when the plaintiff presents a prima facie case of an arbitrary and irrational regulation, the government must prove 1) the regulation serves a public purpose, 2) the means employed by the regulation bear a reasonable relation to the purpose the regulation seeks to achieve, 3) the means do not unduly burden the individual affected by the regulation, and 4) the public interest in the regulation outweighs the harm to the individual. *See* Hodel v. Indiana, 452 U.S. 314, 331-33 (1981). *See generally* R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 32, at 61-64.

be a taking was not challenged for 35 years, until Justice Holmes stated in dictum in *Pennsylvania Coal Co. v. Mahon*[39] that an exercise of police power could at some point become a "taking."[40] It should not be understated; this was a radical idea at the time.[41] It should also be noted that Justice Holmes used the Contract Clause[42] and the Due Process Clause[43] in arriving at the decision; the Court did not find a taking which required just compensation.[44] The next Supreme Court case in which both due process and takings analysis were used to suggest a regulatory taking was *Goldblatt v. Town of Hempstead*[45] in 1962.

In the 1970's, more than 50 years after *Pennsylvania Coal Co. v. Mahon*, landowners began to allege that *regulations* had effected an inverse condemnation for which just compensation (rather than invalidation) was due.[46] Although it has not been the holding of any United States Supreme Court case since then,[47] the Supreme Court has cited

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[39]260 U.S. 393 (1922). The Court held that a state statute exceeded the police power and contravened the rights of the coal-owner under the Contract Clause and the Due Process Clause of the fourteenth amendment. *Id.* at 413. "We assume, of course, that the statute was passed upon the conviction that an exigency exists that would warrant the exercise of eminent domain." *Id.* at 416.

[40]"[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. The meaning of Justice Holmes' statement is unclear; it may mean simply that the regulation would be invalid, or that compensation would be due. *Compare* Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 208-14 (1984) [hereinafter *White River Junction Manifesto*] *with* Bauman, *supra* note 30, at 38-44.

[41]*See* Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287, 294 (1986).

[42]"No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10.

[43]*See supra* note 17.

[44]"But obviously the implied limitation must have its limits, or the contract and due process clauses are gone." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Justice Holmes went on to say, if the regulation violates these, government may acquire the property by eminent domain. *Id. See generally* Note, *Takings Law—Is Inverse Condemnation an Appropriate Remedy for Due Process Violations?*—San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981), 57 WASH. L. REV. 551, 557 n.42 (1982).

[45]369 U.S. 590, 594-96 (1962). The Court recognized the *Mahon* formulation that a "regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation," however, it found no need to decide that question because of lack of evidence that the regulation reduced the value of the lot in question. The Court then proceeded to use traditional due process analysis to reach its decision (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)). For an explanatory model designed to explicitly combine substantive due process and takings analysis see Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983).

[46]HFH Ltd. v. Superior Ct., 15 Cal.3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976). *See* Ragsdale, *supra* note 26, at 230.

[47]The cases involving land use regulation, in which the landowner has claimed a taking, that have reached the Supreme Court since *Mahon* have either upheld the regulation

Holmes' "too far" doctrine in other decisions.[48] The effect of Holmes' doctrine is to limit police power land-use regulatory authority by declaring that the Constitution will trump its exercise at some point. The Takings Clause has come a long way from its original meaning as a restraint on the federal government physically taking land for public purposes without payment, to the idea of its use as a restraint on government regulation in the land use and zoning context. *First Church* moved the meaning of the clause a step further.

5. A New Doctrine.—A new doctrine, temporary regulatory taking, formed the basis for requiring just compensation as a remedy in *First Church.* Justice Brennan initiated the "temporary taking" idea in his 1981 dissent in *San Diego Gas & Electric Co. v. City of San Diego:*[49]

> The fact that a regulatory "taking" may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional "taking." Nothing in the Just Compensation Clause suggests that "takings" must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory "taking" render compensation for the time of the "taking" any less obligatory. This Court more than once has recognized that temporary reversible "takings" should be analyzed according to the same constitutional framework applied to permanent irreversible "takings."[50]

One of the cases cited to support Justice Brennan's statement was *United States v. Causby,*[51] a 1946 Supreme Court case in which frequent low-level flights of Army and Navy airplanes effected a "taking" of an air easement over a chicken farm. In *Causby*, it was not clear whether the taking was a temporary or a permanent taking. "Since on this record *it is not clear whether the easement taken is a permanent or a temporary one*, it would be premature for us to consider whether the amount of

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or not decided the issue. *See* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987) (condition required for granting of a building permit); Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987) (state regulation of coal mining); MacDonald, Sommer, & Frates v. Yolo County, 106 S.Ct. 2561 (1986) (proposed subdivision); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (residential cluster zoning); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (open-space plan); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (historic preservation zoning); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (ordinance prohibiting use of land for gravel mining below water table).

[48]*See, e.g.*, Agins v. Tiburon, 447 U.S. 255, 260 (1980); Andrus v. Allard, 444 U.S. 51, 66 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).

[49]450 U.S. 621 (1981) (Brennan, J., dissenting).

[50]*Id.* at 657.

[51]328 U.S. 256 (1946). *See supra* note 29 and accompanying text.

the award made by the Court of Claims was proper."[52] Justice Brennan cited three World War II cases in which the government was required to compensate property owners for temporary use and occupation of their property—eminent domain cases which involved temporary physical use for which lease payments were due.[53]

Justice Brennan feared that if the remedy for a regulation that goes "too far" was merely the invalidation of the regulation and not money damages, government would not exercise restraint. Government, Justice Brennan warned, could prolong decisionmaking, and make landowners run the gauntlet repeatedly.[54] The Court and critics may be, as one commentator said, willing to live with the "petty larceny of police power" regulations but not with highway robbery.[55]

Justice Brennan may have wanted to be fair to landowners and to increase regulatory decisions which lead to efficient resource allocations. Fairness to landowners affected by land-use regulation implies compensation for their losses caused by the regulation. Economists speak of decisions which efficiently utilize resources by internalizing external costs and benefits, or imposing on decisionmakers all the effects of their decisions.[56] A remedy that requires a damage award or compensation to an injured landowner influences governmental decisionmakers' behavior by imposing the threat of liability for government's regulatory actions.[57] It increases efficiency in decisionmaking by forcing decision-

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[52]*San Diego Gas*, 450 U.S. at 657 (Brennan, J., dissenting) (quoting *Causby*, 328 U.S. at 268) (emphasis in original).

[53]Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

[54]*See San Diego Gas*, 450 U.S. at 655 (Brennan, J., dissenting). A City Attorney of Thousand Oaks, California, was quoted by Justice Brennan as a glaring example of this tactic:

> If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case . . . appears to allow the City to change the restriction in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

Id. at 655 n.22 (quoting Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO MUNICIPAL L. REV. 175, 192 (1975)).

[55]Roberts, *supra* note 41, at 291 (noting that one week before the *Pennsylvania Coal Co. v. Mahon* decision Justice Holmes deleted the "petty larceny" phrase from his opinion).

[56]*See* R. MUSGRAVE & P. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 60-80 (1973). *Cf.* W. FISCHEL, THE ECONOMICS OF ZONING LAWS 116-122 (1985) (argues for a property rights approach as an alternative to traditional economic analysis).

[57]"The knowledge that a municipality will be liable for all of its injurious conduct,

makers to weigh the costs and benefits of regulation.[58]

The remedy Justice Brennan fashioned was one of interim compensatory damages:

> In my view, once a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.[59]

Justice Brennan later denied in a footnote that the remedy was a damages remedy;[60] however, upon his first statement of the remedy, the footnote included a discussion of interim damages,[61] and, in addition, a discussion followed ending with his statement that "[i]nvalidation unaccompanied *by payment of damages* would hardly compensate the landowner for any economic loss suffered during the time his property was taken."[62] Therefore, the theory of a "temporary regulatory taking" is that, if a court holds a government has taken by regulating, the government may keep the regulation and file eminent domain actions, amend the regulation to make it acceptable to the court, or rescind the regulation; nonetheless, government pays damages for the period the property was "taken." In reaching its decision in *First Church*, the majority adopts Justice Brennan's temporary regulatory taking doctrine and remedy as formulated in the dissenting opinion in *San Diego Gas*.[63]

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whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." Owen v. City of Independence, 445 U.S. 622, 651-52 (1980).

[58]Sometimes regulatory policies are designed to impose external costs on others in order to keep the government and society in general from bearing those costs, such as regulations designed to induce polluters to internalize the costs of their activities. If government liability is used as a policy tool to deter the passing of regulations, however, such liability may instead provide an incentive for government inaction because no liability attaches to a decision not to act, resulting in inefficiency. The efficiency argument can go either way. *See generally* Sterk, *Government Liability for Unconstitutional Land Use Regulations*, 60 IND. L. J. 113 (1984).

[59]San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (1981)(Brennan, J., dissenting). In a footnote, Justice Brennan explains that under his rule, he would give the government entity whose police power regulation was found to be in violation of the Takings Clause the option upon the court's ruling to then amend the offending regulation or to use eminent domain powers to condemn the property. *Id.* at 653 n.19.

[60]*Id.* at 659 n.24.

[61]*Id.* at 655 n.20.

[62]*Id.* at 656 (emphasis added).

[63]*See infra* note 74. Justices Marshall, Powell, and Stewart joined Justice Brennan in his dissent in *San Diego Gas*, while Justice Rehnquist, writing separately, indicated

II. Analysis of *First Church*

The Supreme Court ruled June 9, 1987, for the first time that a government that prohibits all use of a property by enactment of a land-use regulation must pay compensation for the period of time between the "taking" and the date when a court holds that the property has been taken. The decision modified existing law, adding compensation for a "temporary regulatory taking."[64] Prior to the decision, the California Supreme Court had declared invalidation of the regulation to be the appropriate remedy.[65]

A. The Court Did Not Find a Taking

The First English Evangelical Lutheran Church of Glendale owned a twenty-one acre tract of land nestled in a canyon in Los Angeles County. Upon the land was situated a church camp, "Lutherglen", which was used by church members and by handicapped children and adults. On February 9 and 10, 1978, following a forest fire that denuded acres of forest upstream, a rainstorm dropped eleven inches of rain on the camp and the surrounding area and caused a flash flood which took ten lives and destroyed much property. The flood wiped out Lutherglen's dining hall, two bunkhouses, a caretaker's lodge, an outdoor chapel, and a footbridge across the creek.[66] The flood was the second major flood in the twenty year period the church had owned the property.[67]

In response to the flood, Los Angeles County enacted an interim flood control ordinance which placed building restrictions on twelve acres of the property located on flat land in the floodway. All of the plaintiff's buildings had been located on this land in the floodway. Thus, the church sought compensation alleging that the ordinance prohibited all use of its property. The California courts ruled against the church receiving compensation, citing a 1979 case, *Agins v. City of Tiburon*[68] (upheld by the United States Supreme Court in 1980 on procedural grounds), in which the remedy available was limited to overturning the land-use regulation, not compensation.

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support for Justice Brennan's dissent, but joined the majority in dismissing for "want of a final judgment." *Id.* at 636. In *First Church*, the majority consisted of Chief Justice Rehnquist, who wrote the opinion, Justices Brennan, Marshall, Powell, Scalia, who replaced Stewart on the Court, and White, who appears to have switched sides.

[64]First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2383 (1987).

[65]Agins v. City of Tiburon, 24 Cal.3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd* on other grounds, 447 U.S. 255 (1980).

[66]*First Church*, 107 S. Ct. at 2381.

[67]Brief of Appellee at 7, *First Church* (No. 85-1199).

[68]24 Cal.3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

The Supreme Court in *First Church* did not say that a flood control ordinance is on its face a taking, or that this ordinance as applied is a taking. Because the church did not challenge the flood control ordinance facially, facial validity was not an issue or a question decided. Rather, the church alleged that this ordinance as applied denied the landowner all use of its property; nevertheless, the Court did not decide the as-applied question on the merits but remanded for the California Court of Appeal to decide whether the flood control ordinance denied all use.[69]

B. The First Church *Decision*

1. The Claim for Compensation was Properly Presented.—The Supreme Court in *First Church* wanted to decide the remedy issue, an issue not reached in four previous cases before the sharply divided court since 1980.[70] The Court could have again refused to decide the issue by

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[69]The Court rejected the suggestion that

> [W]e must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question. . . . We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property . . . . [The question remains] open for decision on the remand we direct today.

First Church, 107 S. Ct. at 2384-85.

Most local flood control ordinances based on solid technical information and accurate hydrological studies that have been challenged have been upheld. *See* Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEX. L. REV. 201, 233 n.61 (1974). Ordinances were upheld in Turner v. Town of Walpole, 409 N.E.2d 807 (Mass. App. 1980) and Turnpike Reality Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973). *See generally* R. ANDERSON, AMERICAN LAW OF ZONING § 9.49 (3 ed. 1986). The Federal flood insurance statute discourages floodplain development by requiring local governments, as a precondition to issuance of subsidized insurance policies, to adopt local flood control ordinances. 42 U.S.C. § 4015 (1982 & Supp. 1983). *See infra* note 172.

[70]The Court had been chided for this lack of decision, *see, e.g.*, Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, 18 URB. LAW. 635 (1986). "Legal scholars with a flair for the arcane may discover whether the Court has now set a record for futility by deciding four cases without once reaching the issue for which review was granted." *Id.* at 655.

The four cases were *MacDonald, Sommer, & Frates v. Yolo County*, 106 S. Ct. 2561 (1986) (5-4 decision); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (5-4 decision); and Agins v. Tiburon, 447 U.S. 255 (1980). In *Agins*, the United States Supreme Court ruled the regulation did not effect a taking and, therefore, did not reach the remedy issue. 447 U.S. 255. In *Yolo County*, the court held lower court rulings left open the possibility that some development would be permitted, and, without reaching the taking issue, the remedy issue was not ripe. 106 S.Ct. 2561. In *Williamson County*, the Court held the landowner was required to "resort to the procedure for obtaining variances [that] would result in a conclusive determination by the Commission whether it

ruling there was no taking as a matter of law, or it could have found the case was not ripe for decision. Instead, in *First Church*, the Court noted that the complaint *alleged* that a regulation had denied the landowner all use,[71] that the California Court of Appeal in an unreported decision assumed the complaint sought "damages for the uncompensated *taking* of all use,"[72] and that the California Supreme Court denied review. Therefore, the United States Supreme Court found the constitutional question squarely presented without the need to independently evaluate the adequacy of the complaint or resolve the taking claim on the merits before reaching the remedial question.[73]

2. The Just Compensation Clause of the Fifth Amendment Provides Compensation for a Temporary Regulatory Taking.—The issue the United States Supreme Court decided was whether the payment of damages is required for the period of time prior to the ultimate invalidation of the challenged regulation during which a regulation denies a landowner all use of his land.[74] Chief Justice Rehnquist, writing for the majority of six Justices, found guidance in the same cases from the World War II period cited by Justice Brennan in *San Diego Gas*.[75] "These cases reflect the fact that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[76] The opinion

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would allow [the landowner] to develop the subdivision in the manner . . . proposed." 473 U.S. at 193. Also, the landowner "did not seek compensation through the procedures the State has provided for doing so." *Id.* at 194. In *San Diego Gas*, the Court held that no final judgment had been entered in the state court and "further proceedings are necessary to resolve the federal question whether there has been a taking at all." 450 U.S. at 633.

[71]In *Williamson County*, the Court had required a final decision by the lower courts that the land-use regulation was a "taking" before the issue was ripe. 473 U.S. at 186. Following that, in *Yolo County*, the dissent suggested the issue was not premature if the landowner's pleading sufficiently alleged there had been a final decision denying all reasonable economic beneficial use. 106 S. Ct. at 2572. Subsequently in *First Church*, the majority accepted *Yolo County's* dissenting opinion that an allegation was all that was necessary. 107 S. Ct. at 2384.

[72]In the California trial court, the defendant county moved to strike (CAL. CODE CIV. PROC. § 436) the allegation in the complaint as irrelevant. The trial court granted the motion, and the California Court of Appeal affirmed. 107 S. Ct. at 2384. In contrast, in *Yolo County* the California Court of Appeal read the trial court opinion as a demurrer (CAL. CODE CIV. PROC. § 430.10(3)) which challenges the sufficiency of the pleadings, therefore, not admitting the conclusions of the complaint. 106 S. Ct. at 2563.

[73]*First Church*, 107 S. Ct. at 2384-85. *See supra* note 69.

[74]"[W]e believe . . . [the Supreme Court of California] has truncated the [Takings Clause] rule by disallowing *damages* that occurred prior to the ultimate invalidation of the challenged regulation." *Id.* at 2387 (emphasis added).

[75]*Id. See supra* note 53 and accompanying text.

[76]*Id.* at 2388.

regarded two earlier cases which denied compensation for the regulatory "taking" of property prior to invalidation as "cases merely stand[ing] for the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking. . . ."[77] The Court's statement of the holding was, "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[78]

The Court reversed the California Court of Appeal and remanded the case for that court to decide on the merits if the church had been denied all use[79] and, if so, whether the denial might be non-compensable on the theory of the state's authority to enact safety regulations,[80] directing attention to the police power regulatory cases, *Goldblatt v. Town of Hampstead*,[81] *Hadacheck v. Sebastian*,[82] and *Mugler v. Kansas*.[83]

3. Justice Steven's Dissent.—Justice Stevens wrote the dissenting opinion, in which he was joined in part by Justices Blackmun and O'Connor.[84] The dissent concluded that the majority had acted imprudently by deciding the remedy issue when a decision could have been avoided because no lower court had decided there was a taking. Justice Stevens stressed that this appellant was not "entitled to compensation as a result of the flood protection regulation that the County enacted."[85] Citing *Keystone Bituminous Coal Association v. DeBenedictis*[86] and *Mugler v. Kansas*,[87] he argued that government may protect the health and safety of the community.[88] Stevens wrote, "As far as the United States

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[77]*Id.* The cases were Danforth v. United States, 308 U.S. 271 (1939), and Agins v. Tiburon, 447 U.S. 255 (1980).

[78]*First Church*, 107 S. Ct. at 2389.

[79]*Id.*

[80]*Id.* at 2384-85.

[81]369 U.S. 590 (1962). *See supra* notes 45, 47, & *infra* note 99.

[82]239 U.S. 394 (1915). *See infra* note 109.

[83]123 U.S. 623 (1887). *See supra* note 36 & *infra* note 109.

[84]Justices Blackmun and O'Connor did not join in Justice Steven's discussion of whether a temporary taking that goes too far always constitutes a constitutional taking even if in effect only for a limited period of time, *First Church*, 107 S. Ct. at 2393-96, or in his discussion of preference for the Due Process Clause in protecting property owners from unfair and dilatory government decisionmaking. *Id.* at 2398-99. For discussion of the Due Process Clause in relation to land-use regulations, *see* Note, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative To Takings Analysis*, 57 WASH. L. REV. 715 (1982).

[85]*First Church*, 107 S. Ct. at 2391.

[86]107 S. Ct. 1232 (1987). *See infra* note 115 and accompanying text.

[87]123 U.S. 623 (1887). *See supra* note 36 and text accompanying note 37, & *infra* note 109 and text accompanying notes 108-17.

[88]*First Church*, 107 S. Ct. at 2391.

Constitution is concerned, the claim that the ordinance was a taking of [the church's property] should be summarily rejected on its merits."[89]

The dissent regarded as a distortion of precedent the majority's conclusion that all ordinances which would be a "taking" if in effect permanently, necessarily were a "taking" if in effect temporarily. The question, according to the dissent, is whether a "temporary" regulation was so severe that a taking occurred during the period before the regulation was invalidated; only extreme regulations are "takings." Only where a "major portion of the property's value" is taken away is there an actual taking.[90]

C. A New Remedy

Compensation for a "temporary regulatory taking" is a new remedy. "Temporary regulatory taking" means the taking that occurs in the interim period after enactment or the effective date of the regulation, but before the regulation is held unconstitutional, which holding forces the government to choose either to amend or rescind the regulation, or to exercise eminent domain powers. However, a very similar remedy was available prior to the *First Church* decision using either the Takings Clause[91] or substantive due process analysis,[92] and Section 1983.[93] If a regulation is declared invalid on substantive due process grounds, the landowner can then file a Section 1983 suit for damages for the interim period during which the regulation was in effect. The primary difference between the two remedies is that the new remedy is based on the United States Constitution, while the Section 1983 claims are statutory. One problem with the new remedy is that a regulation cannot be invalidated without requiring a damage award, a separation which might be appropriate in some cases. The goal of the landowner may not be to win damages, but to get the unwanted regulation rescinded.

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[89]*Id.* at 2393.

[90]*Id.* at 2393-96.

[91]Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981).

> Since the just compensation clause applies to the states through the due process clause of the fourteenth amendment . . . an action for damages will lie under § 1983 in favor of any person whose property is taken for public use without just compensation by a municipality through a zoning regulation that denies the owner any economically viable use thereof.

Id. at 1200. *See generally* Madsen & DeMeo, *Private Property Rights and Local Government Land Use Control: 42 U.S.C. § 1983 as a Remedy Against Unconstitutional Deprivations of Property*, 1 J. LAND USE & ENTL. L. 427 (1985).

[92]Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1985).

[93]42 U.S.C. § 1983 (1982). *See generally* D. HAGMAN & J. JUERGENSMEYER, *supra* note 27, at 311-17 & 845-73.

1. "Temporary" Means Interim.—The word "temporary" in temporary regulatory taking is an inaccuracy of speech. An additional confusion regarding the word "temporary" is the fact that in *First Church*, the "temporary" regulation was replaced with a permanent regulation. More specifically, the challenged regulation was a temporary emergency ordinance enacted on January 11, 1979, to be in effect while a permanent ordinance was being drafted, hearings were being held, and the ordinance was being adopted. In spite of this fact, the church's claims were based on the temporary ordinance and were not amended to reflect the permanent ordinance adopted on August 11, 1981.[94] In the opinion, Chief Justice Rehnquist states that a "temporary" regulatory taking is one later invalidated by a court.[95] A distinction in duration is used as if it were a difference in kind of taking, when really the Court is promulgating a new remedy for a different time period—the period before a court invalidates a regulation. The correct word is interim because the holding in *First Church* was that a regulation, whether in effect for a short or a long duration (one use of "temporary"), whether replaced by another regulation or not (another use of "temporary"), *if* invalidated by a court leads in every case to the government paying for the interim "use" of the property.[96]

2. "All Use" as a Standard or Test.—The Court utilized the phrase "all use" in the holding of *First Church*. "We merely hold that where the government's activities have already worked a taking of *all use* of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[97] Undoubtedly, a challenger will find it difficult to prove that a regulation took all use. Possibly, the Court could have meant that unless *all use* has been denied, no compensation is required.[98] Although such an argument can be made, a more likely reason for choosing the phrase is that it was taken from the complaint to avoid

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[94]Brief of Appellee at 10-13, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987) (No. 85-1199).

[95]*First Church*, 107 S. Ct. at 2383.

[96]*Id.* at 2389.

[97]*Id.* (emphasis added).

[98]All zoning will permit the owner some use, even if the use is only agricultural, open space, or wetland. The zoning may restrict buildings but still provide for uses which have some economic value, e.g., archery ranges, arboretums, athletic fields, beaches, boarding horses, boat rental, campgrounds, fishing and casting ponds, greenhouses, golf courses, golf driving ranges, parks, pastures, playgrounds, polo fields, riding and hiking trails, riding academies, stables, rodeos, ski lifts, tows, and runs, swimming pools, tennis courts, volleyball courts, and so forth. *See generally* P. ROHAN, 6 ZONING AND LAND USE CONTROLS (1987). In addition, restrictions may effect only part and not all of a property. *See generally* R. ANDERSON, *supra* note 69, at § 17.01-17.79.

stating what the standard for finding a taking is because the Court has said it has no clear standard or test.[99]

Various statements of a test for finding a taking have appeared in the cases. Justice Holmes in *Mahon* used "diminution in value."[100] Since then, there have been many formulations; the one closest to "all use" is found in *United States v. General Motors Corp.*,[101] where the Court noted, "[when the] effects [of government's actions] are so complete as to deprive the owner of *all* or most of his interest in the subject matter, [it amounts] to a taking."[102] A formulation of a test more favorable to a challenger is interference with the investor's investment-backed expectations.[103] In *MacDonald, Sommer, & Frates v. Yolo County*,[104] the Supreme Court wrote, "Our cases have accordingly 'examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment-backed expectation, and the character of the governmental action—that have particular sig-

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[99]Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. . . . [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by government . . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

Id. at 123-24. *Accord* MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986). "To this day we have no 'set formula to determine where regulation ends and taking begins.' " (quoting Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)). *Id.* at 2566.

[100]Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

Id. at 413.

[101]323 U.S. 373 (1945).

[102]*Id.* at 378.

[103]*See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 175 (1985); *Penn Central*, 438 U.S. at 127. *But see* Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 J. OF URB. & CONTEMP. L. 3 (1987) (the author argues the Court should abandon the investment-backed expectations taking factor).

[104]106 S. Ct. 2561 (1986).

nificance.' ''[105] More recently in *Agins v. City of Tiburon*,[106] the Supreme Court stated that "[t]he application of a general zoning law to particular property effects a taking if [(1)] the ordinance does not substantially advance legitimate state interests, or [(2)] denies an owner economically viable use of his land."[107] Where the phrase "all use" came from and what the Court meant is certainly not clear.

III. What Remains Unresolved

The *First Church* decision left important unresolved issues that will be argued about in the future. Most importantly, the Court has yet to resolve what a taking is. Two lines of cases, the *Mugler* line and the *Mahon* line, lead to different formulations of the answer. The older *Mugler v. Kansas*[108] line established that proper use of government's police power in passing appropriate regulations is not a taking:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. . . . The exercise of the police power by . . . prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.[109]

The more recent *Pennsylvania Coal Co. v. Mahon*[110] line argues that a regulation that goes "too far" can be a taking.[111] Although the two

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[105] *Id.* at 2566 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

[106] 447 U.S. 255 (1980).

[107] *Id.* at 260 (citations omitted).

[108] 123 U.S. 623 (1887). *See supra* note 36. The attempt to distinguish "regulation" from "taking" has been said to be the "most haunting jurisprudential problem in the field of contemporary land-use law— . . . one that may be the lawyers' equivalent of the physicists' hunt for the quark." C. Haar, Land Use Planning 766 (1977).

[109] 123 U.S. at 668-69. Mugler, who owned a brewery, was convicted of making beer without a license during prohibition. He claimed the state's statute violated the fifth and fourteenth amendments and that the regulation of his use was a taking of property without just compensation. Justice Harlan found a valid exercise of regulatory authority to protect the public health, safety and morals.

Other cases in this line are Hadacheck v. Sebastian, 239 U.S. 394 (1915) (a ban on a brickyard within a residential area which had grown up around it; the brickyard had become a health hazard because it produced fumes, gases, smoke and dust) and Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). *See supra* note 45.

[110] 260 U.S. 393 (1922).

[111] *Id.* at 415. *See supra* notes 39-40 and accompanying text.

appear to conflict, *Mahon* did not overturn *Mugler*. In writing about the just compensation issue, commentators have argued that one of these lines of cases was controlling and the other did not apply. Those who argued for compensation as a remedy "heard" *Mahon* and Justice Brennan's dissent in *San Diego Gas*,[112] and found the *Mugler* line not controlling.[113] Those who argued for invalidation only and opposed compensation as a remedy "heard" *Mugler* and found Justice Holmes' statement in *Mahon* "metaphoric."[114]

The fact is, the two are not mutually exclusive; the Court is still following both lines as evidenced by two decisions handed down in 1987—*First Church*, which descends from the *Mahon* line, and *Keystone Bituminous*,[115] which descends from the *Mugler* line. In *Keystone Bituminous*, the Court held that a Pennsylvania regulation of coal mining was a valid exercise of the state's police power to protect public health and welfare. "Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis."[116] The Court explicitly rejected the assertion that *Pennsylvania Coal* overruled *Mugler* and the *Mugler* line of cases which focus on the state's legitimate interest in regulating.[117]

Another unresolved issue is whether alternatives to compensation may be substituted for compensation. Alternatives in lieu of compensation could work to a property owner's advantage without as great a cost to

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[112]San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981). *See supra* text accompanying notes 59-62.

[113]*See* Bauman, *supra* note 30.

[114]*See White River Junction Manifesto*, *supra* note 40, at 212 n.62 (quoting Justice Breitel in Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 594, 350 N.E.2d 381, 385, 385 N.Y.2d 5, 8 (1976), who said the metaphor Holmes used should not be confused with the reality which was that the regulatory measure was an invalid exercise of police power under the due process clause).

[115]Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987) (5-4 decision). At first reading, the facts of *Keystone Bituminous* seem very similar to the facts of *Pennsylvania Coal Co. v. Mahon*, but the majority opinion distinguishes the cases on two bases:

> First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare. Second, there is no record in this case to support a finding, similar to the one the Court made in *Pennsylvania Coal*, that the Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations.

Id. at 1242.

Chief Justice Rehnquist, who wrote the dissenting opinion in *Keystone Bituminous*, is unpersuaded that either reason makes this case distinguishable. *Id.* at 1253.

[116]*Id.* at 1244.

[117]*Id.*

government. An example, transferable development rights, was used in *Penn Central Transportation Co. v. New York City*.[118] It is not clear what the Court meant in *First Church*, but it appears to have ruled out alternatives when it noted, "[only compensation] meet[s] the demands of the Just Compensation Clause."[119]

An additional issue concerns the possibility of government enacting moratoria without liability for compensation. "Pauses for planning and deciding" moratoria have been considered valid exercises of police power if in effect only for a limited time. However, in one sense, a moratorium would deprive an owner of *all use* for a defined period, and therefore, after the *First Church* decision, arguably would be impossible without payment of compensation.[120] Conversely, an argument can be made that courts are not likely to invalidate such moratoria, and, unless a regulation is ultimately invalidated by a court, compensation is not required.

The Court also failed to delineate clearly when a "taking" begins in a temporary regulatory taking. The analysis of when a taking begins benefits from dividing time into three periods—before the regulation is enacted or becomes effective, from that time until the regulation is invalidated by the court, and after invalidation. The Court had said that normal delays in the first period are acceptable.[121] In the second period, just compensation is the remedy.[122] The Court in *First Church* says a taking begins when a regulation is adopted or becomes effective, but, if those dates are not the same, the Court does not say which date is the time when a taking begins.[123] A more appropriate time in some cases may be when the landowner applies unsuccessfully for a permit to begin development or when the decisionmaking body refuses a landowner's petition.

In developing the new temporary regulatory taking remedy, two issues appear to have been resolved, but counsel seeking innovative arguments may still want to attack them. One issue that appears to be resolved is the proper measure of the amount of compensation. In past debate, one suggestion has been the difference between the market value

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[118]438 U.S. 104 (1978), *reh'g denied*, 439 U.S. 883 (1978).

[119]First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2388 (1987). However, at this point the opinion was arguing that invalidation was not sufficient; therefore, perhaps the Court would allow alternatives to compensation.

[120]*See White River Junction Manifesto*, *supra* note 40, at 218.

[121]*First Church*, 107 S. Ct. at 2389.

[122]*Id.*

[123]*Id.* at 2388. In *First Church*, the interim ordinance was *adopted* by the County of Los Angeles in January, 1979, and became *effective* immediately. Thus, the dates were the same and there was no need for the Court to explain which it meant.

as regulated and the market value if unregulated.[124] Another suggestion has been "fair compensation."[125] The Court decided to apply a rental or lease value, the "value of use of land during the period."[126] Another issue that appears to be resolved is whether government receives any interest in the challenger's land if a temporary regulatory taking is found.[127] In the dissenting opinion in *San Diego Gas*, Justice Brennan said the payment is not for ownership but for the temporary use.[128] The Supreme Court in *First Church* held "that invalidation . . . without payment of fair value for the *use* of the property . . . would be a constitutionally insufficient remedy."[129] Government apparently receives no interest because nothing really is "taken"; the property is only used.

Prior to *First Church*, an issue thought to be resolved was that a challenger must have a final decision and exhaust all state or local procedure by which it might obtain just compensation. Although the Court in *First Church* chose to formulate a new remedy by assuming without deciding that the complaint alleged a taking of all use, rather than requiring the church to have a final decision and exhaust state and local procedure for compensation, the rule should be settled based on precedent. In *MacDonald, Sommer & Frates v. Yolo County*,[130] the Court held landowners must obtain a final decision regarding an application of a zoning ordinance to their property before it is possible to tell whether the land retains any reasonable beneficial use.[131] In addition, the majority in *First Church* declared that a claim is not ripe for review until the litigant seeking compensation has sought compensation through

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[124]*See generally* Note, *Affirmative Relief for Temporary Regulatory Takings*, 48 U. PITT. L. REV. 1215, 1221-27 (1987) (the author argues that affirmative relief, the power of the court to order government action, coupled with a damages remedy is superior to either invalidation or compensation alone); Ragsdale, *supra* note 26, at 231.

[125]*See* Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COL. L. REV. 1021, 1052 (1975). "Fair" compensation, according to Professor Costonis, is a middle level of compensation based on a reasonable beneficial use standard rather than a highest and best use standard.

[126]*First Church*, 107 S. Ct. at 2388.

[127]If there is a name for it, the interest taken by a land-use regulation would be a negative easement in gross. *See* Humback, *A Unifying Theory for the Just-Compensation Cases: Taking, Regulation and Public Use*, 34 RUT. L. REV. 243, 250 (1982).

[128]San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 658 (1981). Justice Brennan identifies the interest taken: "[W]here the 'taking' already effected is temporary and reversible and the government wants to halt the 'taking' . . . 'abandonment [of the regulation] . . . merely results in an alteration of the property interest taken—from full ownership to one of temporary use and occupation. . . .' " *Id.* (quoting United States v. Dow, 357 U.S. 17, 26 (1958)).

[129]*First Church*, 107 S. Ct. at 2389 (emphasis added).

[130]477 U.S. 340 (1986).

[131]*Id.* at 350.

the procedures the state has provided.[132] Nevertheless, the majority ignored this requirement in reaching the decision because of its perception of the procedural posture of the case. However, the rule based on the Supreme Court's own declarations and holding should be that a challenger must have a final decision and exhaust state or local procedure for compensation before a challenge is ripe for adjudication.

IV. The Practical Consequences of *First Church* to Local Planners and Decisionmakers[133]

Government at all levels is concerned about the effect the *First Church* decision will have. All levels of government filed amici briefs[134] before the Supreme Court. The legal daily and monthly press[135] prominently featured articles about the decision. Justice Stevens, in his dissent, suggested that although the Court's decision would spawn a great deal of unproductive litigation, the duty to defend these challenges would have significant adverse impact on the land-use regulatory process.[136] Justice Stevens concluded his dissenting opinion, warning:

> The policy implications of today's decision are obvious and, I fear, far reaching. Cautious local officials and land-use planners

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[132]*First Church*, 107 S. Ct. 2378 at 2384 n.6 (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)). *Cf.* Paratt v. Taylor, 451 U.S. 527, 544 (1981) (Section 1983 requires exhaustion of state common law remedies). *See* Note, *Ripeness for the Taking Clause: Finality and Exhaustion in* Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 13 Ecology L. Q. 625, 639-42 (1986).

[133]The author uses the word "local" to include cities, towns, municipal corporations, counties, water, fire, and other special-purpose units called "special districts."

[134]The brief for the United States was filed by the Solicitor General and an Assistant Attorney General. A brief was filed for the states of California, Alaska, Arkansas, Florida, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wyoming, and the Commonwealth of Puerto Rico. The county level was represented by the National Association of Counties, joined by a diverse group of city, city management, planning, legislative, gubernatorial and mayoral national associations. A brief was filed by a number of California cities. In addition to government, a brief was filed by a group of environmental, conservation, park, historic preservation, and natural resource national organizations in support of the County of Los Angeles. (Five amici curiae briefs were filed in support of the church.)

[135]*See, e.g.*, Callies, *Takings Clause—Take Three*, 73 ABA J., 48 (1987); Guskind, *Takings Stir Up a Storm*, Planning, Sept. 1987, at 5; Sallet, *Court Expands "Takings" Clause*, Legal Times, Sept. 14, 1987, at 25; Merrill, *Takings Clause Re-Emerges, But No Clear Pattern Seen*, Nat'l Law Journal, Aug. 17, 1987 at 5-8; *Supreme Court Holds Compensation Is Due*, Zoning News, June 1987, at 1.

[136]First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2389-80 (1987).

> may avoid taking any action that might later be challenged and thus give rise to a damage action. Much important regulation will never be enacted,[137] even perhaps in the health and safety area. Were this result mandated by the Constitution, these serious implications would have to be ignored. But the loose cannon the Court fires today is not only unattached to the Constitution, but it also takes aim at a long line of precedents in the regulatory takings area. It would be the better part of valor simply to decide the case at hand instead of igniting the kind of litigation explosion that this decision will undoubtedly touch off.[138]

Chief Justice Rehnquist was aware the decision would impede enactment of land-use regulations:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them.[139]

Both sides agree the decision has serious implications for the land-use regulatory process.

A. Land-Use Decisions Are Made Primarily at the Local Level

Almost all land-use decisions are made at the local level.[140] The decisions are primarily case by case dispute resolution influenced by notions of economic efficiency and legal fairness. Most people in local communities want local government to promote growth and development

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[137]There is real concern that planners will chose not to act. A survey of 300 members of the National Association of County Planning Directors showed that forty-eight percent would adopt zoning regulations modeled on the provision upheld in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), which closed a sand and gravel mine. However, if damages were to be awarded as well as invalidation of the regulation, only eight percent said they would, while eighty-three percent would chose not to act. Sallet, *The Problem of Municipal Liability for Zoning and Land-Use Regulation*, 31 CATH. U. L. REV. 465, 478 (1982). The cost of one suit, if it would have been lost, was $36 million. *Id.* at 478 n.91.

[138]*First Church*, 107 S. Ct. at 2399-2400 (footnote omitted).

[139]*Id.* at 2389.

[140]The state of Hawaii is an exception; a state land-use commission makes the land-use decisions. HAW. REV. STAT. § 205-1 to 37 (1985). In addition, a few states have set up for all or for part of the state regional land-use commissions which review decisions of local government for regional impacts. W. FISCHEL, *supra* note 56, at 26.

which will generate tax revenue, but to control and guide development, and to mitigate harmful impacts. Land has value because land use has value, and therefore, it follows that restrictions on use reduce the economic value of the land.

State courts rather than federal courts provide most of the judicial review of land-use decisions. *All* the zoning cases in the 40 years after *Nectow v. City of Cambridge*[141] were decided at the state level.[142] Although all state courts rely on the same United States Supreme Court decisions, the states have interpreted those decisions differently. For example, one commentator has characterized the California courts as being "exceedingly deferential to land-use controls adopted by local government."[143]

The process of land-use decisionmaking usually involves staff recommendations, appointed or elected legislative or quasi-judicial boards or commissions holding public hearings, two sides (petitioners and remonstrators), often represented by attorneys, presenting their case, and ultimately voting requiring a majority or supermajority to decide.[144] Land-use planners work with the community to design a comprehensive land-use plan which is a map document designed to distribute classes of land uses, e.g., residential, commercial, industrial.[145] Zoning ordinances are laws prescribing permitted uses and standards within each district for building height, bulk, setbacks, density, and so forth.[146] Each parcel of property is, therefore, in a zoning class with restrictions on the use and

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[141]277 U.S. 183 (1928).

[142]*See* R. ELLICKSON & A. TARLOCK, LAND-USE CONTROLS 67 (1981).

[143]*See id.*, at 75.

[144]The author served for nearly five years on the Metropolitan Development Commission for the City of Indianapolis. IND. CODE § 36-7-4-202 (1988). State law generally grants specific authority to local governmental units to perform certain functions. The Metropolitan Development Commission consists of nine appointed and unpaid commission members drawn from the general population. The Commission approves planning and zoning ordinances for the city which are then sent to the City-County Council for adoption, and then to the Mayor for his signature. Among other duties, it also hears requests for rezonings. INDIANAPOLIS, IND. CODE § 2-229 (1983). The task of the Commission is formidable. Trying to follow as much as possible plans that have previously been adopted, trying to arrive at equitable decisions, realizing a decision may mean a lot of money to someone, and trying to foresee what will be the best solution overall for the community in the long run is difficult. In addition, who *wants* to decide where the trash may go (landfill siting), and where the smut may go (Adult Entertainment Ordinance)?

For an excellent discussion of the usual parties in interest in land-use disputes (developers, neighbors, and third party non-beneficiaries), the relative strengths (the cards are often stacked against neighbors, heavily stacked against third party non-beneficiaries), and the influence on public decisions of the need for local tax revenue (there is an inherent bias in the system in favor of proposals that generate tax revenue), see *White River Junction Manifesto*, *supra* note 40, at 197-208. For comic relief, *see id.*, at 194 n.10.

[145]*See* R. ANDERSON, *supra* note 69, at §§ 9.02, 23.11.

[146]*See id.* § 9.12.

with prescribed standards for development. A landowner who wants a change requests a rezoning (e.g., residential to commercial), a variance (e.g., height greater than the standard), conditional use, administrative approval, special permit or other means to change or vary the zoning restrictions on the property.[147] Large developments may use a provision called a Planned Unit Development.[148] Of course, land-use regulation includes more than zoning; it also includes environmental, flood, signage, safe building, and historic preservations controls. The list is not exclusive, but rather shows the magnitude of local land-use regulatory decisions that are affected by the *First Church* decision.

Local land-use decisionmakers are criticized for responding irrationally and unfairly; decisions are often made on the basis of who howls the loudest. But the American public prefers land-use decisions to be made locally where they have the most influence.[149] Local decisionmaking bodies are often mediators of competing interests, deciding each case on it own facts. The process is not perfect but it does allow people to be heard.

B. Local Governments Are in a Vulnerable Position

The impact of the new liability for damages is heightened because local governments are already in a vulnerable position. As the following four sub-sections elaborate, local governments are vulnerable because they may not have the sovereign immunity that the federal and state governments enjoy, because they are subject to substantial costs under both Section 1983 and antitrust actions, and because they are "caught in the middle," between litigants, and between being required to regulate and being liable if they do.

1. Tort Liability.—Historically, sovereign immunity applied to state and local governments as a complete defense against tort claims.[150] Between 1957 and 1979, at least 28 states judicially abolished sovereign immunity and at least six states legislatively abolished or severely limited it.[151] Therefore, in some states a litigant can now raise tort theories (assumption of duty, common law negligence, interference with economic and business relationships, and statutory negligence) against local governments.[152]

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[147]*See id.* §§ 4.27, 19.06, 20.02, 21.01, 34.22.

[148]*See id.* § 11.12. A Planned Unit Development permits a mix of residential, commercial, and sometimes industrial uses within a large tract of land under one ownership.

[149]*See* Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 911 (1983).

[150]*See* R. ELLICKSON & A. TARLOCK, *supra* note 142, at § 26.01, 26.02.

[151]*See id.*

[152]*See* 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § § 53.02b, 53.16 (3d ed. 1984).

2. Section 1983 Liability.[153]—Originally enacted to protect the civil rights of newly freed slaves, Section 1983 has practically become a federal tort law.[154] In 1978, the Supreme Court held in *Monell v. New York City Department of Social Services*[155] that municipalities were "persons" and, therefore, subject to suit under Section 1983 for land-use regulations. "Congress *did* intend municipalities and other local government units to be included among those persons to whom section 1983 applies."[156] In addition to actions against local government, government officials may be sued in their official or individual capacity.[157] Although state and local legislators and judges have absolute immunity for acts within the scope of official duties, local government officials may not be immune for enforcement actions which can be characterized as administrative rather than legislative[158] and for actions with malicious intent.[159] Even if damage awards are minimal, local government can be held liable for attorney fees which can be substantial.[160] The availability of attorney fees has dramatically increased the amount of this kind of litigation.[161]

3. Antitrust Liability.—In 1978, the Supreme Court decided in *City of Lafayette v. Louisiana Power & Light Co.*[162] that a city's regulatory activity, unlike a state's, is not exempt from antitrust liability. Cities

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[153]42 U.S.C. § 1983 (1982) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See generally Madsen & DeMeo, *supra* note 91.

[154]*See* D. HAGMAN & J. JEURGENSMEYER, *supra* note 27, at 845.

[155]436 U.S. 658 (1978).

[156]*Id.* at 690 (emphasis in original).

[157]Owen v. City of Independence, 445 U.S. 622 (1980). Although individual government officials may be sued, their actions do not cause vicarious liability of the government unit on respondeat superior theory unless they act under an official government custom or policy. The dissent in *First Church* expressed apprehensiveness. "I am afraid that any decision by a competent regulatory body may establish a 'policy or custom' and give rise to liability after today." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2400 n.17 (1987) (Stevens, J., dissenting).

[158]Scheuer v. Rhodes, 416 U.S. 232 (1974).

[159]Procunier v. Navarette, 434 U.S. 555, 566 (1978).

[160]Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)).

[161]*See* M. GELFAND, FEDERAL CONSTITUTIONAL LAW AND AMERICAN LOCAL GOVERNMENT, xv (1984).

[162]435 U.S. 389 (1978). *See generally* Hovenkamp & Mackerron, *Municipal Regulation and Federal Antitrust Policy*, 32 U.C.L.A. L. REV. 719 (1985).

became targets for antitrust suits, many involving land-use regulation.[163] Antitrust law is designed to foster action in private markets; land-use regulatory controls may interfere with the free operation of supply and demand. Treble damage judgments were awarded against local government[164] until Congress passed the Local Government Antitrust Act of 1984.[165] Although local governments and their officials are immune from damage claims, they may still be sued for antitrust violations with injunctive relief as the remedy. Compliance with the injunction can be very costly to carry out.[166]

4. Caught in the Middle.—Finally, local government is in a vulnerable position because it is caught in the middle, subject to suit for land-use decisions by both developers (petitioners) and neighbors or "public interest" lawyers in the land-use field (remonstrators).[167] Most of the suits are filed by developers. Fewer suits are filed by public interest lawyers because public interest law is underfunded but the threat always is present.[168] However, public interest lawyers usually do not pursue individual's claims. Suits filed by "neighbors" are rare because neighbors generally are not organized and lack funds to litigate.[169]

Additionally, a new way that local government is caught in the middle is that it may be required to regulate by federal or state law, but after *First Church* it is also subject to damages if the regulation goes "too far."[170] In some instances, environmental, flood control, safe building, and similar ordinances are required by federal or state laws.[171]

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[163]*See* Mason City Center Assocs. v. City of Mason City, 468 F. Supp. 737 (N.D. Iowa 1979), *aff'd in part, rev'd in part,* 671 F.2d 1146 (8th Cir. 1982); Cedar-Riverside Assocs., Inc. v. United States, 459 F. Supp. 1290 (D. Minn. 1978), *aff'd on other grounds sub nom.* Cedar-Riverside Assocs. v. City of Minneapolis, 606 F.2d 254 (8th Cir. 1979).

[164]Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).

[165]Pub. L. 98-544, 98 Stat. 2750 (1984) (codified at 15 U.S.C. §§ 35, 36 (Supp. IV 1985)). Section 3(a) says, "No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act . . . from any local government, or official or employee thereof acting in an official capacity." 15 U.S.C. § 35(a) (Supp. IV 1985).

[166]*See* D. HAGMAN & J. JEURGENSMEYER, *supra* note 27, at 907-09.

[167]*See generally* Hall, *Defending the Urban Environment: A Practitioner's View*, 55 U.M.K.C. L. REV. 251 (1987).

[168]Court-awarded attorney fees are available in some states and for cases brought under the Clean Air Act, the Clean Water Act, and other environmental legislation passed after 1970. *Id.* at 262. *See generally* M. DERFNER & A. WOLF, COURT AWARDED ATTORNEYS FEES (1985).

[169]*See White River Junction Manifesto, supra* note 40, at 197-208.

[170]The Advisory Commission on Intergovernmental Relations has identified more than 35 major federal regulatory statutes aimed at or implemented by state and local governments. Some of them have an impact on zoning. Beam, *From Law to Rule: Exploring the Maze of Intergovernmental Regulation*, ACIR, Spring 1983, Vol. 9, No. 2, at 7-22.

[171]Examples of federal laws which mandate local government to pass local ordinances

Even when not required, federal and state law may provide benefits to local government and local beneficiaries for passage by government of such regulation. An example is flood protection regulations which make landowners eligible for federal flood insurance.[172]

V. Conclusion

Despite the dour predictions of Justice Stevens, the gravity of the *First Church* decision to the governmental amici, and the banner headlines of the press, local government need not be overly concerned that the ruling will bankrupt local government and, as a result, cease regulating land use. Why? *First Church* is an important but narrow decision. It merely said compensation is the remedy for temporary regulatory takings.[173] However, the decision in *Keystone Bituminous*[174] shows that state and local governments may regulate as long as the state's interest in the regulation is a valid exercise of the police power to protect public health and safety. Such regulations are not likely to be held to be a "taking"; therefore, the remedy will not be imposed by the courts. Moreover, a heavy burden is on a landowner who claims that a land-use regulation works an unconstitutional taking of property because the landowner has to prove a regulatory taking.[175] Finally, the test or standard

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include the National Environmental Policy Act of 1969, and the Clean Air Act Amendments of 1970. An example of a state law is the California Coastal Act which requires local government within the coastal zone to prepare and submit a local coastal plan including land use plans, zoning ordinances, and zoning district maps. Cal. Pub. Res. Code § 30500(a) (1986).

[172]Congress enacted a federal flood control policy designed to make those who develop flood hazard areas responsible for the results of their own actions. To implement this policy, the federal flood insurance program is intended to be self-financing with those who use flood prone land paying insurance premiums to cover the cost of disaster relief. 42 U.S.C. §§ 4001, 4002 (1982). For landowners to be eligible for the insurance, local governments must adopt flood control ordinances. Local government is required to designate property eligible for flood insurance by preparing maps defining flood prone areas. Local governments also are required to guide development with building standards and to control use with a permit system for all new construction within the designated areas. 44 C.F.R. § 60.3(b) (1987).

[173]*See supra* text accompanying note 78.

[174]Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987). *See supra* note 115 and text accompanying notes 115-17.

[175]For example, the lower court on remand could yet decide the regulation substantially furthered a legitimate police power purpose. Land-use regulations do not affect takings if they substantially advance legitimate state interests and do not deny landowners economically viable use of their land. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3146 (1987) (5-4 decision). Furthermore, the Court in *Nollan* said government is permitted to do more than simply regulate; it may impose conditions for the issuance of a land-use permit as long as a rational nexus exists between the condition and the purpose

for finding a taking is unclear, leaving government attorneys free to argue about what a challenger must show before compensation is due.[176]

As long as local governments proceed cautiously, enacting only those regulations that meet legitimate health, safety, and welfare needs, and do so fairly and without unnecessarily burdening landowners or taking away all use, they have little chance of having to pay compensation. Private property rights should be protected, but the public needs regulation of land use for health, safety, and general welfare reasons. Courts must balance those interests. If government oversteps legitimate need or denies economically viable use, acts unfairly in how it regulates, or unnecessarily burdens landowners when a less burdensome way to accomplish the legitimate goal is possible, then a sanction is necessary. The sanction will deter "inefficient" decisions and encourage "efficient" decisions.

The United States Supreme Court in *First Church* said the Just Compensation Clause of the fifth amendment establishes such a sanction, a right of a landowner[177] to be compensated as a remedy for temporary regulatory takings. If such an interim "taking" is found, a right to compensation for the "use" of the land is found in the clause. The Supreme Court continues to try to find an appropriate balance between property rights of the individual and legitimate health and safety needs of the public.

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of the building restriction. In *Nollan*, the Court held the essential nexus did not exist. *Id.* at 3148. *See generally* Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L. J. 335, 352-56 (1988); Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L. J. 359, 376-96 (1988).

[176]*See supra* text accompanying notes 97-107.

[177]Landowner, not property owner, is correct because other kinds of property besides land (in particular new property, such as entitlements and benefits) are not included. More specifically, Chief Justice Rehnquist treats "new property" differently than traditional property rights. Note, *Justice Rehnquist's Theory of Property*, 93 YALE L. J. 541 (1984).

Dissenting Shareholders' Rights Under the Indiana Business Corporation Act: Jurisprudential Interpretations of the Exclusivity Provision

I. Introduction

Indiana recently revised its Business Corporation statute and greatly liberalized the procedures by which a shareholder may dissent from a corporate action.[1] However, a dissenting shareholder who employs these procedures will find that the statutory remedy is limited, in that the statute makes the right to dissent and obtain payment for a fair value of shares the *exclusive* remedy.[2] The statute further confines the availability of this remedy to closely held corporations, or to publicly held corporations which provide an optional grant of this remedy by an act of the Board of Directors.[3] This limitation could produce inequitable results, particularly when applied against a minority shareholder who considers himself an active participant in the corporation's affairs.[4]

When corporate leadership decides to engage in a transaction that materially alters the nature or form of the enterprise, those shareholders who do not favor the transaction face a dilemma. They must decide whether to accept the action without complaint, sell their shares on the market, move to enjoin the corporate action, or demand an appraisal and payment of the value of their shares from the corporation.[5] All states have statutes which govern the dissenting shareholders' appraisal remedy,[6] yet often the scope of any given statute is questionable.

Scholars do not know exactly how or where the first appraisal action occurred,[7] but generally accept that the appraisal remedy arose upon

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[1]Ind. Code §§ 23-1-44-1 to -20 (1988). The entire Indiana Business Corporation Law, Ind. Code §§ 23-1-17-1 to -54-2 (1988), is generally based upon the Revised Model Business Corp. Act (1984).

[2]Ind. Code § 23-1-44-8(c) (1988). *See infra* notes 64-67 and accompanying text.

[3]Ind. Code § 23-1-44-8(a)(5) (1988). For the purposes of this Note, a corporation is defined as a closely held corporation or a publicly held corporation which has granted the dissenters' right to its shareholders. *See infra* notes 87-95 and accompanying text.

[4]Most investors in large publicly held corporations view themselves as passive investors who contribute capital in exchange for possible dividends. Shareholders in a closely held corporation, on the other hand, are often employees of the business and consider themselves to be "owners." *See* R. Clark, Corporate Law 761-62 (1986).

[5]*Id.* at 499-530. *See also* Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 Harv. L. Rev. 1189, 1191 (1964) [hereinafter *Exclusiveness*].

[6]In addition to the fifty states, the District of Columbia and Puerto Rico also have dissenters' statutes. 3 Model Business Corp. Act Ann. 1369-70 (Supp. 1987).

[7]*See* Kanda & Levmore, *The Appraisal Remedy and the Goals of Corporate Law*, 32 UCLA L. Rev. 429 (1985) [hereinafter *Goals of Corporate Law*].

the abolishment of the requirement of unanimity for corporate action.[8] This remedy allowed dissenting shareholders who no longer wished to remain vested in a fundamentally different enterprise to demand payment for their shares from the corporation.[9] If the corporation refused to pay, the dissenting shareholders could enjoin the corporate action.[10] As economic theory and corporate law developed, this constant threat of injunction began to be viewed as a burden too heavy for the modern corporation.[11] The need for flexibility of management and control in the modern corporation are now deemed to be superior to the wants of a minority shareholder.

In an often cited commentary, Professor Manning points out that the goals and policies of modern appraisal statutes no longer protect either the dissenting shareholder or the corporation.[12] American commercial law no longer recognizes the investor as an "owner," but rather as one who has a "claim" against the corporation.[13] Dissenting shareholders generally will not give up the benefit of their shares pending appraisal, while the corporation, prior to announcing any type of corporate change, often has a very difficult time determining the number or tenacity of dissenters.[14] Because the appraisal remedy is a product of nineteenth-century corporate law, Professor Manning concluded that the entire remedy should be restructured under purely economic terms.[15]

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[8]Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 228-29 (1962) [hereinafter *Essay*].

[9]Gabhart v. Gabhart, 267 Ind. 370, 380, 370 N.E.2d 345, 352 (1977).

[10]*See* State v. Bailey, 16 Ind. 46 (1861).

[11]Echoing James Madison's fear of tyranny under the desires of an unrestricted majority, Professor Manning states:

> In political terms these statutes fill a basic democratic need to protect a dissident minority from the overwhelming power of the majority. A solicitous judiciary will use the injunction to protect the minority against the most heinous acts of the majority. Where the majority is not heinous but merely obnoxious, the dissenter is given a lesser remedy—the option to force the corporation to pay him off and let him go his way.

Essay, *supra* note 8, at 226. *See also* 3 MODEL BUSINESS CORP. ACT ANN. introductory comment at 1354-55 (Supp. 1987). The authors of the Revised Act have attempted to structure a statute which weighs the equities between the wants of the dissenter and the wants of the corporation.

[12]*See generally Essay*, *supra* note 8.

[13]*Id.* at 299. A shareholder who considers himself an owner would generally be an investor who also is employed by the corporation, or is actively involved in the company's daily affairs. A shareholder who possesses a "claim" in a corporation, on the other hand, is one who merely invests capital in an enterprise, regardless of whether that corporation is closely or publicly held. *See infra* notes 160-212 and accompanying text.

[14]*See Essay*, *supra* note 8, at 232-35.

[15]*Id.* at 260.

More recently, however, other commentators have pointed out that with the increased ease of procedure employed under modern appraisal statutes, the focus is now upon allocation of risks and transaction costs.[16] Under a purely economic analysis, an appraisal is advantageous for *all* shareholders of a corporation.[17] However, for this analysis to stand, the statute which provides the remedy must meet certain requirements.[18] The statute should specifically define the types of transactions which trigger the remedy,[19] should establish procedures which provide the corporation with fair notice of which shareholders intend to dissent from a proposed action[20] and should allow dissenters to retain rights under their shares until the payment is finalized.[21] The statute should also reasonably define how the shares are to be valued,[22] and (as much as practical) should make appraisal the exclusive remedy.[23] If a statute specifies all of these things, then all parties can factor these elements into the price that they are willing to pay for a share in the enterprise.[24] By implicitly agreeing to the limits of an appraisal *ex ante*, both majority and minority shareholders can profit.

Parties who bargain at arm's length generally are allowed to provide for a limitation of remedies,[25] but corporate statutes are often viewed as permissive guidelines, set down by the sovereign, for the benefit of entrepreneurs who wish to incorporate under the laws of that jurisdiction.

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[16]Fischel, *The Appraisal Remedy in Corporate Law*, 1983 AM. B. FOUND. RES. J. 875, 878-81 [hereinafter *Appraisal Remedy*]. *See also Goals of Corporate Law*, *supra* note 7.

[17]*See infra* notes 197-99 and accompanying text.

[18]An example of such a statute is the REVISED MODEL BUSINESS CORP. ACT §§ 13.01 to 13.31 (1984) which was adopted by the Committee on Corporate Laws of the Section of Corporation, Banking & Business Law of the American Bar Association.

[19]3 MODEL BUSINESS CORP. ACT ANN. § 13.02 (Supp. 1987).

[20]*Id.* § 13.21. *See infra* notes 33-37 and accompanying text.

[21]3 MODEL BUSINESS CORP. ACT ANN. § 13.25 (Supp. 1987). Under some statutes, a dissenter cannot collect dividends once an appraisal proceeding is initiated. *See infra* notes 29-32 and accompanying text.

[22]3 MODEL BUSINESS CORP. ACT ANN. § 13.01(3) (Supp. 1987). *See also infra* notes 96-148 and accompanying text.

[23]3 MODEL BUSINESS CORP. ACT ANN. § 13.02(b) (Supp. 1987). This exclusivity provision states that "[a] shareholder entitled to dissent and obtain payment for his shares under this chapter may not challenge the corporate action as unlawful or fraudulent with respect to the shareholder or the corporation." *Id.*

[24]This, of course, assumes that all investors are infinitely rational beings who consider every conceivable element when valuing their investments. *See infra* notes 197-201 and accompanying text.

[25]*See, e.g.*, Brademas v. Real Estate Development Co., 175 Ind. App. 239, 370 N.E.2d 997 (1977), wherein the court concluded that a clause in the contract which excluded certain equitable remedies was enforceable, even though specific performance is usually available in real estate disputes.

Investors, by choosing to incorporate under the statutes of a given state, have, in essence, agreed to follow a set "form" contract for the governance of their business. Chapter 44 of the new Indiana Business Corporation Law[26] substantially decreases the burdens of dissent under previous law.[27] Because of this new-found ease in exercising dissenters' rights, an increase in this type of activity will occur. Although the statute is clearly written and unambiguous on its face, it remains to be seen exactly how an Indiana court will interpret the statute's scope.[28]

This Note will first discuss the procedures available under the new dissenters' statute. It will then examine the exclusivity provision in light of the theories utilized by Indiana courts under the previous law, and the theories employed by courts from other jurisdictions. It will further examine the permissible valuation considerations available in a dissenters' action. It will conclude with an evaluation of the exclusivity provisions in the context of arguments based upon property ownership and purely economic considerations. It is the central thesis of this Note that the exclusivity requirement should be enforced against all shareholders except those very few who are active participants in the enterprise, who also would be irreparably harmed by the illegal activities of the majority.

II. New Procedures

Under the previous Indiana dissenters' statute,[29] dissenters were relegated to using the procedures then in force for eminent domain proceedings.[30] If they chose to dissent from the majority's opinion, the dissenting shareholders gave up all voting and dividend rights to which they were otherwise entitled.[31] The dissenters also lost entitlement to interest payments for the value of their shares between the time they initiated the proceedings and the final judgement.[32] Therefore, because the corporation paid no interest, dissenters often settled their claims early, rather than endure the costly, inefficient and lengthy eminent domain proceeding.

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[26]Ind. Code §§ 23-1-44-1 to -20 (1988).

[27]*See infra* notes 29-32 and accompanying text.

[28]The comments to the Business Corporation Law were published in 1988. Although not binding authority, the comments are a great help in determining legislative intent. *See* Ind. Code Ann. §§ 23-1-17-1 to -54-2 (West Supp. 1988).

[29]Ind. Code § 23-1-5-7 (repealed 1987).

[30]*Id.* §§ 32-11-1-1 to 32-11-1-13. Eminent domain proceedings are particularly cumbersome in a shareholder's appraisal action because the statute requires three appraisers who are "freeholders of the county." *Id.* § 32-11-1-4. Every county may not have three qualified appraisers who could properly value shares in a corporation.

[31]*Id.* § 23-1-5-7 (repealed 1987).

[32]*See* General Grain, Inc. v. Goodrich, 140 Ind. App. 100, 221 N.E.2d 696 (1967).

Unlike previous Indiana law, the new dissenters' statute outlines specific and simple procedures to be followed by all parties, and is a much needed improvement over eminent domain procedures. When the leadership of a corporation contemplate any transaction that could trigger dissenters' rights,[33] and when such action is to be presented at a shareholders' meeting, all shareholders who are eligible to assert dissenters' rights must be notified before the meeting.[34] If the corporate action does not require a shareholders' vote,[35] then notice must be given within ten days of the corporate action.[36] This dissenters' notice must state where a demand for payment of shares is to be sent, and by what date the demand must be received.[37]

A shareholder who wishes to dissent from the proposed action must then send a demand for payment of shares to the corporation and deposit his shares as instructed by the dissenters' notice.[38] The new statute explicitly states that a dissenter loses no rights to the shares until the corporation takes the proposed action.[39] As soon as the corporation receives the payment demand, or as soon as it takes the proposed action, it must pay the dissenter the amount the corporation determines to be the fair value of the dissenter's shares.[40]

If the dissenter decides that the payment received is less than the fair value of the shares, he may make a second demand for payment of what he declares to be the fair value (less any amount already paid).[41] The second demand must be made within thirty days of the initial payment or offer of payment, or the shareholder will be deemed to have waived all rights to demand further payment.[42] Upon receipt of this second demand for payment, the corporation has sixty days in which to petition a court for a judicial appraisal of the value of the shares.[43] If the corporation does not bring suit within sixty days, it must pay the dissenter the amount requested in the second demand letter.[44]

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[33]IND. CODE § 23-1-44-8 (1988). *See infra* notes 58-62 and accompanying text.

[34]IND. CODE § 23-1-44-10(b) (1988).

[35]An example of such an action would be a sale of certain assets, where such authority is granted to the corporate management in the Articles of Incorporation or Bylaws.

[36]IND. CODE §§ 23-1-44-10(b) and -12 (1988).

[37]*Id.* § 23-1-44-12.

[38]*Id.* § 23-1-44-13.

[39]*Id.* § 23-1-44-13(b).

[40]*Id.* § 23-1-44-15. The statute makes no provision for delay. The corporation must pay the claim within sixty days from the date set for demanding payment. *Id.* § 23-1-44-18(a)(2).

[41]*Id.* § 23-1-44-18.

[42]*Id.* § 23-1-44-18(b).

[43]*Id.* § 23-1-44-19(a).

[44]*Id.*

If the corporation chooses to sue, the court may, at its discretion, appoint an appraiser.[45] Each party is allowed discovery rights and the right to present evidence.[46] The dissenter collects any amount greater than that first paid by the corporation, plus interest, if the court determines the initial payment was insufficient.[47]

The court may assess costs against either party and in any amount the court finds equitable.[48] The corporation must pay costs if the court decides it "did not substantially comply with the requirements"[49] of the statute, while the dissenters must pay costs if the court finds that they acted "arbitrarily, vexatiously, or not in good faith"[50] while pursuing their rights. If most dissenters' demands are characterized as "good faith" differences in opinion over the value of shares, then corporations will bear a heavier burden in proving that their initial low payments were substantially in compliance with the statutory requirements.

The new statute also clarifies the rights of beneficial owners who wish to dissent from a proposed action.[51] Now, a record shareholder may assert dissenters' rights for fewer than all of his shares, as long as the record shareholder asserts these rights "with respect to all shares beneficially owned by any one (1) person."[52] If the beneficial shareholder wishes to assert his own dissenters' rights, then he must provide the corporation with the record shareholder's written consent.[53]

If a shareholder acquires stock in the corporation after notice of the transaction which could give rise to dissenters' rights, the corporation may withhold payment to that shareholder if he later tries to dissent.[54]

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[45]*Id.* § 23-1-44-19(d).

[46]*See id.*

[47]*Id.* § 23-1-44-19(e). For the purposes of the dissenters' statute, interest "means interest from the effective date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans or, if none, at a rate that is fair and equitable under all the circumstances." *Id.* § 23-1-44-4. This provision for interest payments remedies the unfairness in the previous statute, pointed out over twenty years ago in *General Grain, Inc. v. Goodrich*, 140 Ind. App. 100, 109, 221 N.E.2d 696, 701 (1967), wherein the court stated:

> This glaring injustice of the Indiana Act is a matter for the General Assembly, but this court should not concern itself with either the expediency nor need for corrective legislation. The court is charged with the responsibility to interpret and construe legislative enactments, and it is beyond the power of the court to legislate by judicial fiat.

[48]IND. CODE § 23-1-44-20 (1988).

[49]*Id.* § 23-1-44-20(b)(1).

[50]*Id.* § 23-1-44-20(b)(2).

[51]*Id.* § 23-1-44-6. A beneficial shareholder is one whose stock is actually held by another nominated record shareholder, such as The Depository Trust Company or a brokerage firm.

[52]*Id.* § 23-1-44-9(a).

[53]*Id.* § 23-1-44-9(b).

[54]*Id.* § 23-1-44-17(a).

This holder of "after-acquired" dissenters' rights must then either accept the corporation's first offer of payment "in full satisfaction of [his] demand,"[55] or wait until a final judicial determination before he receives any payment at all.[56] The purpose of this provision is to prevent speculation after the announcement of the proposed corporate action.[57]

The more important aspects of the dissenters' statute, as with any statute, will be how, when and in what manner it will be applied. Transactions which trigger dissenters' rights under this statute include a consummation of a plan of merger[58] or a plan of share exchange,[59] a sale or exchange of all (or substantially all) of the corporation's assets,[60] an approval of a control share acquisition,[61] and any action from which any shareholder may dissent as provided in the corporation's bylaws, articles of incorporation or directors' resolution.[62] The "market exception" provision, which excludes dissenters' rights from holders of shares which are widely traded, has been retained from previous law.[63] A shareholder with dissenters' rights under the statute, however, has only the right to dissent and receive payment of fair value as his exclusive remedy.[64]

III. Exclusivity

The provision for absolute exclusivity of remedy will likely be the most troublesome aspect of the new statute. The initial draft of the Business Corporation Law presented to the study commission[65] included a disclaimer to the exclusivity section. This disclaimer stated that the dissenter's right to payment for a fair value for his shares is exclusive unless the action is "unlawful or fraudulent with respect to the shareholder or the corporation."[66] This disclaimer was stricken from the bill as presented to the General Assembly,[67] and therefore the statute as promulgated appears to be absolutely exclusive.

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[55]*Id.* § 23-1-44-17(b).

[56]*Id.* § 23-1-44-19.

[57]3 Model Business Corp. Act Ann. § 13.27 official comment at 1417 (Supp. 1987).

[58]Ind. Code § 23-1-44-8(a)(1) (1988).

[59]*Id.* § 23-1-44-8(a)(2).

[60]*Id.* § 23-1-44-8(a)(3).

[61]*Id.* § 23-1-44-8(a)(4).

[62]*Id.* § 23-1-44-8(a)(5).

[63]*Id.* § 23-1-44-8(b). *See infra* notes 87-92 and accompanying text.

[64]Ind. Code § 23-1-44-8(c) (1988).

[65]Draft of November 5, 1986, Legislative Services Agency Preliminary Draft No. 5501/DI 41.

[66]*Id.* § 23-1-42-8(b). This is the exact language found also in the Model Act. *See* 3 Model Business Corp. Act Ann. § 13.02(b) (Supp. 1987).

[67]Engrossed House Bill No. 1257-LS 9283/DI 33, presented to the 1986 Indiana General Assembly on January 8, 1986.

A. Previous Indiana View: Gabhart v. Gabhart

The leading Indiana case which dealt with the exclusivity of dissenters' rights prior to the enactment of the new statute is *Gabhart v. Gabhart*.[68] The case arose when several shareholders voted to merge a corporation into another "shell" corporation and pay a minority shareholder cash for his shares of the liquidated company.[69] This type of cash out merger is often referred to as a "freeze-out" or "squeeze-out."[70] The minority shareholder brought suit claiming that the transaction was actually a "*de facto*" dissolution, accomplished for no legitimate business purpose, but rather solely to "freeze-out" an unwanted minority shareholder.[71]

The Indiana Supreme Court stated that "in a bonafide merger proceeding a dissenting or non-voting shareholder is limited to the means provided by statute for the realization of his equity."[72] The court implied, however, that a merger which advanced no corporate interest *could* be enjoined by a minority shareholder, if that shareholder could show the merger had no valid business purpose.[73] The court indicated that the then leading Delaware case of *Singer v. Magnavox, Co.*,[74] was too expansive in considering the "entire fairness" of corporate action to minority shareholders.[75] The court concluded that "[w]e do not believe the judiciary should intrude into corporate management *to that extent*."[76] From this, it can be presumed that an Indiana court will intrude upon some managerial actions which advance no valid corporate interests. Although the freeze-out of a troublesome minority shareholder is viewed as a legitimate corporate interest under *Gabhart*, and Indiana courts are

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[68]267 Ind. 370, 370 N.E.2d 345 (1977).

[69]*Id.* at 376, 370 N.E.2d at 349.

[70]*Id.* at 383, 370 N.E.2d at 353. *See also Exclusiveness*, *supra* note 5, at 1192.

[71]*Gabhart*, 267 Ind. at 383, 370 N.E.2d at 353.

[72]*Id.* at 388, 370 N.E.2d at 356.

[73]The court concluded by stating:

> [W]e further hold that a proposed merger which has no valid purpose, which we construe to mean a purpose intended to advance a corporate interest, and which merger would eliminate or reduce a minority shareholder's equity, may be challenged, as a *de facto* dissolution, by shareholders entitled to vote upon an issue of dissolution. Such shareholders may enjoin a dissolution to be effected by procedures other than those provided by statute for that purpose.

Id.

[74]380 A.2d 969 (Del. 1977).

[75]*Gabhart*, 267 Ind. at 388, 370 N.E.2d at 356.

[76]*Id.* (emphasis added). The Official Comment states that the General Assembly specifically made dissent the exclusive remedy in response to the Indiana Supreme Court's holding in *Gabhart*. IND. CODE ANN. § 23-1-44-8 official comment at 168 (West Supp. 1988). It does, however, seem to be logically inconsistent to deny equitable relief to a dissenter, even in the light of unlawful or fraudulent conduct, while still allowing equitable relief for managerial misconduct. *See infra* notes 168-83 and accompanying text.

not apt to be concerned over a simple "fairness" issue brought before them by a dissenter, it is clear that certain acts by the majority will not be tolerated.

B. Delaware View: Weinberger v. U.O.P., Inc.

In 1983, the Delaware Supreme Court ended its reliance upon the *Singer* doctrine of "entire fairness" to the minority shareholder.[77] In *Weinberger v. U.O.P., Inc.*,[78] the court stated that a minority shareholder could no longer simply allege "unfairness" when seeking judicial review of a merger. Instead, the dissenter who challenges the corporate action as being unfair must "allege specific acts of fraud, misrepresentation or other items of misconduct" to demonstrate the unfairness of the merger terms to the minority.[79] The court also broadened the scope of the types of valuation techniques which are to be used in an appraisal proceeding.[80]

The decisions in *Weinberger* and *Gabhart* focus upon the level of managerial misconduct that will trigger judicial intervention. This same type of analysis must be used to determine the willingness of a court sitting in equity to enjoin an action under Indiana's new statute. Of the fifty-two appraisal statutes in force throughout the United States,[81] all are written to be the exclusive dissenters' remedy, unless equitable considerations provide otherwise.[82] The Connecticut statute states that appraisal is the sole remedy.[83] This statute, drafted by Professor Manning,[84] was held to be *absolutely* exclusive when a minority shareholder attempted to attack a merger in a direct suit.[85] Given the same situation, an Indiana court could also regard the literal language of a statute as controlling, and therefore award only the fair value of shares and no equitable relief. However, before a conclusion can be drawn about whether an Indiana court will allow a minority shareholder to be "dragged kicking and screaming against his will"[86] into a cash-out merger, a few other provisions of the new statute should be analyzed.

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[77]Singer v. Magnavox, Co., 380 A.2d 969 (Del. 1977).

[78]457 A.2d 701 (Del. 1983).

[79]*Id.* at 703.

[80]*Id. See also infra* notes 109-27 and accompanying text.

[81]*See supra* note 6.

[82]3 MODEL BUSINESS CORP. ACT ANN. § 13.02 statutory comparison at 1372-73 (Supp. 1987).

[83]CONN. GEN. STAT. ANN. § 33-373 (West 1987).

[84]*See Goals of Corporate Law*, *supra* note 7 and accompanying text.

[85]Yanow v. Teal Industries, Inc., 178 Conn. 262, 422 A.2d 311 (1979). The court concluded that had the legislature intended for any equitable exceptions to apply, it would have provided for such exceptions within the statute.

[86]*Essay*, *supra* note 8, at 261.

C. *The Market Exception and Risk Assessment*

Indiana has retained the "market exception" for shares which are listed on a United States securities exchange.[87] This exception has also been broadened to include those shares which are traded on NASDAQ or similar markets.[88] The Indiana legislature obviously places great faith in the ability of the market to value shares. Following this presumption, there can be no real issue of valuation if the corporation's shares are widely traded.[89] A shareholder may not appreciate the direction in which the corporation is proceeding, but it is more economical to sell shares on the market than to formally dissent from the action. This "market exception" was removed from the Model Act in 1978 because of the mistrust of the ability of the then "demoralized" market to accurately value shares.[90] By choosing to retain and expand this exception, Indiana has, in effect, chosen to offer dissenters' rights only to shareholders of closely held corporations. This limitation could greatly strengthen an argument for absolute exclusivity if one can presume that holders of shares in closely held corporations are better informed about corporate control *before* investing in the enterprise.[91] Given the American legal demand for "notice," and the goals of modern dissenters' statutes to provide adequate "notice," it is presumed that an investor in a closely held corporation could more easily acquaint himself with corporate risks, and thereby devalue the price he is willing to pay for a share in the enterprise.[92]

A second portion of the new statute also impacts risk assessment by allowing a board of directors, on its own initiative, to create dissenters' rights to any corporate action.[93] This optional grant of dissenters' rights should increase the flow of information between investors and management, and thereby ease the tension felt when shareholders seek information about corporate affairs. Additionally, when a shareholder is

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[87]IND. CODE § 23-1-44-8(b)(1) (1988). The previous "Stock Market" exception was found in IND. CODE § 23-1-5-7 (1982) (repealed 1987).

[88]NASDAQ is the National Association of Securities Dealers, Inc. Automated Quotations System, Over-the-Counter Markets-National Markets Issues. *Id.* § 23-1-44-8(b)(2).

[89]*See* Note, *A Reconsideration of the Stock Market Exception to the Dissenting Shareholder's Right of Appraisal*, 74 MICH. L. REV. 1023 (1976).

[90]Conard, *Amendments of Model Business Corporation Act Affecting Dissenters' Rights (Sections 73, 74, 80, and 81)*, 33 BUS. LAW. 2587, 2595-96 (1978) [hereinafter *Amendments*]. Given the tumultuous events of October, 1987, perhaps the market may again become "demoralized."

[91]The Securities Exchange Act of 1934 was specifically designed to control misrepresentations in the exchange of publicly traded securities. 15 U.S.C. § 78 (1982).

[92]*See* Easterbrook & Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271 (1986) [hereinafter *Close Corporations*].

[93]IND. CODE § 23-1-44-8(a)(5) (1988).

notified "up front" about possible dissenters' rights, or potential corporate dealings, he could again discount the value of his shares in reliance upon this information.[94] Furthermore, if an event triggering dissenters' rights does occur, and the shareholder has *bargained* for this right, then he is more apt to settle the claim, thereby decreasing transaction costs for all parties involved.[95]

D. Valuation

The valuation provision in the new statute has been liberalized.[96] Historically, courts have valued shares by using the "Delaware block" approach.[97] In using this method, a court first estimates market value, projected earnings and assets, then applies a weighted multiplier to each factor.[98] Each estimated value is then multiplied by the weight factor, and the sum total of the products is taken to be the appraised value.[99] This method is usually employed to offset any unfairness which could arise from using only market value, because market value reflects only a price based upon available information.[100] The use of this technique has been modified to a great degree in recent years,[101] to correct inadequacies in certain situations.[102]

To ensure that a dissenting shareholder will not be in any way affected by the transaction from which he dissents, Indiana's new valuation provision mandates that the fair value is to be calculated from a point in time immediately before the transaction occurs.[103] To further ensure fairness, the statute also makes it clear that this calculated value must exclude "any appreciation or depreciation in anticipation of the corporate action *unless exclusion would be inequitable.*"[104] The exclusion

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[94]R. POSNER, ECONOMIC ANALYSIS OF LAW 324-26 (2d ed. 1977).

[95]*See id.* at 306.

[96]IND. CODE § 23-1-44-3 (1988).

[97]However, after the Delaware Supreme Court's decision in *Weinberger v. U.O.P., Inc.*, 457 A.2d 701 (Del. 1983), the "Delaware block" approach is no longer the only admissible valuation method. *See infra* notes 112-19 and accompanying text; *see also* Note, *"Fair-Value" Determination in Corporate "Freeze-Outs," and in Security and Exchange Act Suits:* Weinberger, *Other, and Better Methods*, 19 VAL. U.L. REV. 521 (1985) [hereinafter *"Fair-Value" Determination*]; Francis I. DuPont & Co. v. Universal Cities Studios, Inc., 312 A.2d 344 (Del. Ch. 1973).

[98]*See "Fair-Value" Determination*, *supra* note 97, at 527.

[99]*Id.* at 528.

[100]*See* Endicott Johnson Corp. v. Bade, 37 N.Y.2d 585, 338 N.E.2d 614, 376 N.Y.S.2d 103 (1975).

[101]*See* Weinberger v. U.O.P., Inc., 457 A.2d 701 (Del. 1983).

[102]For example, market value is difficult to estimate for closely held corporations. *See generally "Fair-Value" Determination*, *supra* note 97.

[103]IND. CODE § 23-1-44-3 (1988).

[104]*Id.* (emphasis added).

of appreciation and depreciation is consistent with previous Indiana law,[105] but the phrase, "unless exclusion would be inequitable," is borrowed from the Revised Model Business Corporation Act.[106]

This phrase was added to the Model Act in 1978 to deal specifically with the problems encountered in corporate "freeze-outs."[107] The comments to this amendment state that such considerations are to be employed only when a shareholder is "excluded against his will from continued participation in the altered enterprise."[108] The current comments to the Model Act[109] explain this exception by incorporating by reference the reasoning of the Delaware Supreme Court in *Weinberger*,[110] wherein it was held that elements of rescissory damages could be employed if the court decides that such a remedy is equitable.[111]

Of much greater importance, however, was the *Weinberger* court's holding that the "Delaware block" method of calculating an appraisal value is no longer the preferred technique in all situations.[112] Now courts may admit into evidence an appraisal value based upon any acceptable valuation method.[113] Any value which incorporates a price based upon appreciation or depreciation due to the proposed action will be excluded under Delaware's valuation statute.[114] However, the court interpreted this provision to refer only to "speculative elements of value,"[115] thereby implying that a limited change in value based upon the transaction itself would be permissible. Many courts have since employed the reasoning of *Weinberger* to declare fair value based upon the discounted cash-flow method,[116] investment value[117] and price-earning ratios,[118] as well as the traditional weighted-average approach.[119]

On remand in *Weinberger*, the Delaware Court of Chancery concluded that rescissory damages were too speculative, and awarded one dollar per share as fair compensation for the failure of the directors to

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[105]*See* General Grain, Inc. v. Goodrich, 140 Ind. App. 100, 221 N.E.2d 696 (1967).

[106]3 MODEL BUSINESS CORP. ACT ANN. § 13.01(3) (Supp. 1987).

[107]*See Amendments*, *supra* note 90, at 2600-01.

[108]*Id.* at 2601.

[109]3 MODEL BUSINESS CORP. ACT ANN. § 13.01 official comment at 1358 (Supp. 1987).

[110]Weinberger v. U.O.P., Inc., 457 A.2d 701 (Del. 1983).

[111]*Id.* at 714.

[112]*Id.*

[113]*Id.* at 712-13.

[114]8 DEL. CODE § 262(2)(h) (1983).

[115]*Weinberger*, 457 A.2d at 713.

[116]Dermody v. Sticco, 191 N.J. Super. 192, 465 A.2d 948 (1983).

[117]Richardson v. Palmer Broadcasting Co., 353 N.W.2d 374 (Iowa 1984).

[118]Zokoych v. Spalding, 123 Ill. App.3d 921, 463 N.E.2d 943 (1984).

[119]Perlman v. Permonite Manufacturing Co., 568 F. Supp. 222 (N.D. Ind. 1983), *aff'd*, 734 F.2d 1283 (7th Cir. 1984).

pass on important information.[120] The Chancery court's decision then, in essence, followed the holding in *Tri-Continental Corp. v. Battye*,[121] that "the stockholder is entitled to be paid for that which has been taken from him, viz., *his* proportionate interest in a going concern."[122] By awarding the one dollar per share value as damages, the Chancellor rejected the "discounted cash-flow" method first sought by the plaintiffs, instead giving them an amount sufficient to cover damages arising from a failure to disclose.[123] This specific rejection of plaintiff's valuation technique left the minority with shares valued at twenty-one dollars per share, as opposed to the price of twenty-four dollars per share which the defendant's valuation had estimated to be a fair price.[124]

The Chancellor decided that a minority shareholder should not be given a price which reflects the premium which the majority puts on the control shares of the corporation. This view reflects the theory that the controlling shareholders would never be willing to pay a premium price for "noncontrol" shares.[125] However, if a true "fairness in valuation" approach is applied, the majority should be forced to pay an amount which any third party would be willing to offer.[126] When a minority shareholder is willing to retain his shares which are valued at price X on the market, one can assume that the shareholder values his shares at some amount greater than X. If the minority is able to bargain at arm's length with a party to receive an amount in excess of X, then that amount should be the value which the majority should pay when the minority dissents.[127] Negotiations and judicial proceedings will always increase the transaction costs for any given shareholder; therefore, the minority would probably be willing to settle for a lesser amount.

For example, suppose a shareholder owns 40 percent of the outstanding stock in a publicly traded corporation which has granted dissenters' rights.[128] The market price is $10.00 per share, but the shareholder values it at $11.00 per share because he depends upon the dividends as his sole source of income. The majority will not pay the shareholder's

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[120]Weinberger v. U.O.P., Inc., No. 5642 (Del. Ch. January 30, 1985), *cited in* Weinberger v. U.O.P., Inc., 517 A.2d 653, 654 (1986).

[121]74 A.2d 71 (Del. 1950).

[122]*Id.* at 72 (emphasis added).

[123]*Weinberger*, 517 A.2d at 654.

[124]Weinberger v. U.O.P., Inc., 457 A.2d 701, 709 (Del. 1983).

[125]*See* Chazen, *Fairness from a Financial Point of View in Acquisitions of Public Companies: Is "Third Party Sale Value" the Appropriate Standard?* 36 BUS. LAW 1439 (1981).

[126]*See generally* Weiss, *Balancing Interests in Cash-Out Mergers: The Promise of* Weinberger v. U.O.P., Inc., 8 DEL. J. CORP. L. 1 (1983).

[127]*Id.*

[128]*See supra* note 3 and accompanying text.

value or market value for non-control shares,[129] but the shareholder may find a purchaser who is willing to risk the $11.00 per share value for such a large proportion of the stock. The search for this third party and the ensuing negotiations may be time-consuming and expensive. To avoid this increase in transaction costs, the shareholder will settle with the corporation.

In the context of a closely held corporation, where no available market exists for its shares,[130] the minority faces a greater dilemma. With no third party available, the minority is compelled to negotiate only with the corporation, which will have little incentive to meet the dissenters' price. Although a passive investor may be willing to settle after the corporation's compromise offer,[131] a shareholder who considers himself an owner will expect more than a simple cash-out. This is particularly true if the shareholder is also an employee of the corporation. The "fairness in valuation" doctrine will award an equitable amount for the dissenting employee's shares, but cannot be expanded to cover a loss in salary or other expectations.[132]

The Delaware Supreme Court refused to apply this liberalized "fairness in valuation" standard in *Rabkin v. Philip A. Hunt Chemical Corp.*[133] In *Rabkin*, the Vice Chancellor had dismissed a dissenters' suit to enjoin a cash-out merger.[134] The Supreme Court reversed and remanded, stating that the scope of the holding in *Weinberger* did not mandate dismissal of a suit alleging breaches of fiduciary duties.[135] The Court held that "[t]hese allegations, unrelated to judgmental factors of valuation, should survive a motion to dismiss"[136] because the issues of procedural fairness are actually of broader concern.[137] In conclusion, the court pointed out that although questions of valuation are often the preponderant considerations,[138] this should not preclude a court in equity from exercising its broad discretion when matters of fact (fraud, misrepresentation, self-dealing, etc.) are specifically stated in a complaint.[139]

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[129]The corporation also may not have enough cash on hand to purchase such a large portion of its own stock at such a price.

[130]*See generally* R. CLARK, *supra* note 4, at 762.

[131]*See supra* notes 38-44 and accompanying text.

[132]*See infra* notes 162-187 and accompanying text.

[133]498 A.2d 1099 (Del. 1985).

[134]*Id.* at 1100.

[135]*Id.*

[136]*Id.*

[137]*Id.* at 1105.

[138]*Id.*

[139]The court stressed its earlier conclusion in *Weinberger* by stating:

> [W]hile a plaintiff's monetary remedy ordinarily should be confined to the more liberalized appraisal proceeding herein established, we do not intend any limitation

This type of analysis can also be used by a dissenter under the Indiana statute.[140]

New York amended its appraisal statute in 1982 to liberalize the share valuation method.[141] The New York statute allows a court to "consider the nature of the transaction . . ., the concepts and methods then customary . . . for determining fair value of shares . . . and all other relevant factors."[142] In *Alpert v. 28 Williams St. Corp.*,[143] the New York Court of Appeals held that all factors in an appraisal proceeding are relevant and that "[e]lements of future value arising from the accomplishment or expectation of the merger which are known or susceptible of proof as of the date of the merger and not the product of speculation may also be considered."[144] The court did conclude, however, that "[f]air dealing and fair price alone will not render the merger acceptable . . . there exists a fiduciary duty to treat all shareholders equally."[145]

Commentators have praised these liberal provisions as expansions of economic freedom for both corporate management and shareholders.[146] Some assert that a dissenter will be fairly compensated, and the corporation thereby truly made cost efficient, only by valuing the dissenters' shares using *all* available elements (even factors arising speculatively from the transaction).[147] The question remains, however, whether a court in a jurisdiction which specifically defines dissenters' rights as the exclusive remedy, will allow equity *only* in valuation, or whether equity[148] may still be employed to enjoin a transaction altogether.

> on the historic powers of the Chancellor to grant other relief as the facts of a particular case may dictate. The appraisal remedy we approve may not be adequate in certain cases, particularly where fraud, misrepresentation, self dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved.

Id. at 1104 (quoting Weinberger v. U.O.P., Inc., 457 A.2d 701, 714 (Del. 1983)).

[140]The Seventh Circuit Court of Appeals has stated that it can be presumed that Indiana Courts will generally follow the same reasoning employed by Delaware Courts. Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 253, 256 (1986), *rev'd on other grounds*, 107 S. Ct. 1637 (1987). *See infra* notes 184-87 and accompanying text.

[141]N.Y. BUS. CORP. LAW § 623(h)(4) (McKinney 1986).

[142]*Id.*

[143]63 N.Y.2d 557, 473 N.E.2d 19, 483 N.Y.S.2d 667 (1984).

[144]*Id.* at 571, 473 N.E.2d at 27, 483 N.Y.S.2d at 675.

[145]*Id.* at 572, 473 N.E.2d at 27-28, 483 N.Y.S.2d at 676.

[146]*See Goals of Corporate Law*, *supra* note 7. *See also* Note, *Reappraising Minority Shareholder Protection in Freezeout Mergers:* Weinberger v. U.O.P., Inc., 58 ST. JOHN'S L. REV. 144, 158-62 (1983).

[147]*See Goals of Corporate Law*, *supra* note 7.

[148]*See infra* notes 166-67 and accompanying text.

IV. Interpretation by an Indiana Court

The method which any given court utilizes to interpret a statute is most often a function of that court's legal philosophy. The various schools of jurisprudential thought which affect American courts have been organized into historical categories, based upon how the courts determine the authority of language.[149] The first school of thought, based largely upon the Analytical Positivist views of Austin and Bentham,[150] holds that the legislature is the sovereign, and once the sovereign speaks through a statute, the courts can do nothing but interpret the statute literally.[151] Legal Realists, on the other hand, claim that courts are largely free from the will of the legislature, because true legislative intent can never be properly ascertained.[152] Finally, followers of the Legal Process School take the middle ground, claiming that the legislative purpose is more controlling than legislative language, thereby allowing broad judicial interpretation constrained by the statutory text.[153] The question of the exclusivity of a dissenter's remedy must then be weighed against the philosophical views held by the Indiana judiciary.

As a matter of interpretation, Indiana courts give great deference to the supposed intent or purpose of the legislature.[154] Indiana seldom publishes legislative histories, however, so the intent of the legislature generally must be inferred from the language of the statute itself.[155] By relying on the plain language of the statute viewed "within the context of the entire act,"[156] Indiana courts favor a more moderate approach, much like the Legal Process advocates who seek to elucidate the legislative *purpose* as a goal in statutory interpretation. Following this method, Indiana courts have stated that a statute will not be read literally when such a reading is not in harmony with other sections of the same act, particularly when all sections were passed by the same legislature.[157] Indiana courts will also perform the "ultimate" construction upon a

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[149]Cox, *Ruminations on Statutory Interpretation in the Burger Court*, 19 Val. U.L. Rev. 287-295 (1985) [hereinafter cited as *Statutory Interpretation*].

[150]*See* D. Lloyd, An Introduction to Jurisprudence 246-319 (5th ed. 1985).

[151]*Statutory Interpretation*, *supra* note 149, at 290-93 & n.9.

[152]*Id.* at 292 & n.14.

[153]*Id.* at 293 & n.17.

[154]*See, e.g.*, St. Germain v. State, 267 Ind. 252, 369 N.E.2d 931 (1977); State *ex rel.* Roberts v. Graham, 231 Ind. 680, 110 N.E.2d 855 (1953); Alvers v. State, 489 N.E.2d 83 (Ind. Ct. App. 1986).

[155]*Alvers*, 489 N.E.2d at 88. *See* cases cited *supra* note 154. In addition, the newly published comments are also helpful in establishing legislative intent. *See supra* note 28.

[156]*Alvers*, 489 N.E.2d at 88.

[157]*See, e.g.*, Selmeyer v. Southeastern Indiana Vocational School, 509 N.E.2d 1150 (Ind. Ct. App. 1987); Ware v. State, 441 N.E.2d 20 (Ind. Ct. App. 1982).

statute[158] and declare it inapplicable to the case in controversy,[159] thereby relying solely upon the facts of the case and general principles of law and equity.

In determining how the new dissenters' rights statute will be construed by an Indiana court, one must also analyze how the court will view the shareholder's expectations. One line of thought essentially tracks the classical notions of share ownership as a "property right."[160] In this analysis, the shareholder owns a tangible piece of property, the ownership of which is threatened by the proposed action of the majority. Another theory employs an economic analysis and concludes that the shareholder merely possesses a claim of "liability" against the corporation.[161] Following this logic, the dissenter needs to show that the corporate action essentially devalues his claim of liability to such an extent that he will be irreparably damaged.

A. Exclusivity Viewed Under a "Property" Theory

A dissenter wishing to employ the "property right" argument to enjoin the corporate action will face great difficulty in avoiding a dismissal because of the "exclusivity" provision of the new statute.[162] The dissenter could make two primary arguments based upon the Indiana courts' methods of statutory construction. The first argument arises from the Indiana judiciary's inclination to read an act "as a whole."[163] The second argument arises from the courts' ability to make a discretionary ruling of inapplicability.[164] In either case, the dissenter must convince the court that the legal rules written into the statute are too harsh. A harsh result, however, is not enough to cause the court to make an exception to a statute. The dissenter must persuade the court that the result is so harsh that the legislature *could not have intended this result.* This would allow the court to consider the legislative purpose[165] of the statute and hold

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[158]*See* Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 534 (1983) [hereinafter *Statutes' Domains*].

[159]Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974) (holding a statute of limitations for medical malpractice to be inapplicable to the specific case).

[160]*See generally* R. POSNER, *supra* note 94. *See also infra* notes 162-87 and accompanying text.

[161]*See generally* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) [hereinafter *One View of the Cathedral*]. *See also infra* notes 188-212 and accompanying text.

[162]IND. CODE § 23-1-44-8(c) (1988).

[163]*See* Selmeyer v. Southeastern Indiana Vocational School, 509 N.E.2d 1150 (Ind. Ct. App. 1987).

[164]*See* Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974).

[165]*See supra* notes 154-59 and accompanying text. *See also supra* note 76.

the statute inapplicable in certain situations. When a court makes this type of decision, it can then exercise its equity jurisdiction.

Equity, of course, is much older than the common law,[166] and has always been used to counter the supposed unfairness of applying a strict legal rule to any given set of facts.[167] In appealing to a court in equity, a dissenter could incorporate into his complaint specific allegations against the corporate action. These allegations must, however, arise from some activity other than the corporate action alone. The typical case involves allegations of misrepresentation or breach of fiduciary duty against the corporate directors; therefore, a dissenters' rights case will serve as a fitting example.

Knowing that the new statute makes an appraisal the exclusive remedy, the dissenter could attempt to forgo dissent and move instead for an injunction by alleging that the action constitutes a conflict of interest with respect to one or more of the corporate directors.[168] Such a conflict could arise in situations where the director receives a long term employment contract or a cash out bonus from a surviving corporation in a merger.[169] If such conduct is not disclosed and properly ratified by the directors[170] and shareholders,[171] or if such conduct is not fair to the corporation,[172] then a breach of fiduciary duty has occurred under the Indiana Act.[173] Even ratification by the corporation will not protect the director from allegations of non-disclosure.[174] This misconduct would give the shareholder the right to bring a derivative suit on behalf of the corporation,[175] as long as the corporate action has not yet forced the shareholder out.[176] Therefore, if the court reads the entire Business

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[166]Aristotle spoke of equity as being a corrective form of legal justice. ARISTOTLE, NICOMACHEAN ETHICS *reprinted in* D. Lloyd, *supra* note 150, at 1229-30.

[167]Historically, equity courts were established as a royal dispensation to remedy the inadequacies of the common law. D. LAYCOCK, MODERN AMERICAN REMEDIES 335 (1985).

[168]IND. CODE § 23-1-35-2 (1988).

[169]*See, e.g.*, Smith v. Van Gorkum, 488 A.2d 858 (Del. 1985) (holding a director liable for failing to adequately disclose all material information to the stockholders before a vote on a merger).

[170]IND. CODE § 23-1-35-2(a)(1) (1988).

[171]*Id.* § 23-1-35-2(a)(2).

[172]*Id.* § 23-1-35-2(a)(3).

[173]*Id.* § 23-1-35-1. *See also supra* notes 154-57 and accompanying text.

[174]Floyd v. Jay County Rural Elec. Membership Corp., 405 N.E.2d 630 (Ind. Ct. App. 1980). The standards by which a director's actions will be judged are ambiguous under the new Act. IND. CODE § 23-1-35-1(a)(2) (1988) provides that a director should act with the care of an ordinarily prudent person, while IND. CODE § 23-1-35-1(e)(2) states that a director will not be held liable for a breach of fiduciary duty unless the action "constitutes willful misconduct or recklessness."

[175]Ross v. Tavel, 418 N.E.2d 297 (Ind. Ct. App. 1981).

[176]The shareholder cannot sue derivatively if he no longer is a shareholder. Gabhart v. Gabhart, 267 Ind. 370, 389-91, 370 N.E.2d 345, 356-57 (1977).

Corporation Law "as a whole," the shareholder could claim that the dissenters' statute is the "exclusive" remedy only at law.[177] Because actions for breach of fiduciary duty are brought in equity, wherein the "substance, not the form"[178] is at issue, the court could more easily establish that the directors' duties provisions[179] of the new Act take precedent over the dissenters' rights provisions.[180]

Following the same logic, a minority shareholder might also argue that the dissenters' rights statute is inapplicable to situations of breach of fiduciary duty. By claiming that a proposed action precipitated by inequitable conduct on the part of a director threatened to deprive the minority of ownership in a corporation, a shareholder could claim that the dissenters' remedy is applicable only where the dissenter is a passive investor.

Indiana courts place a high value upon fiduciary duty between both directors and shareholders.[181] An active shareholder in a closely held corporation could argue that such a breach could potentially deprive him of his share of the ownership of the corporation.[182] This argument would be strongest if the shareholder is also an employee of the corporation, and thereby risks a loss of both investment capital and salary. In pursuing this argument, the shareholder would be advised to alternatively plead for either an injunction or an appraisal, because such a complaint otherwise could be construed as an indication that the proposed action does not threaten irreparable injury.[183] If the court disagrees that the proposed action threatens irreparable injury and dismisses the complaint, the plaintiff is relegated solely to an appraisal.

A court which views the plaintiff's claim as one of "ownership" will weigh the active investor/employee's expectation interests. Before issuing an injunction, this court must determine whether the legal remedy would be adequate.[184] A legal remedy is not adequate unless it is "as

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[177]When law does not give an adequate remedy, equity may be employed to protect the rights of the litigant. *See* D. LAYCOCK, *supra* note 167, at 335-36.

[178]*Ross*, 418 N.E.2d at 304 (quoting Epperly v. E & P Brake Bonding, Inc., 169 Ind. App. 224, 236, 348 N.E.2d 75, 82 (1976)).

[179]IND. CODE §§ 23-1-35-1 to -4 (1988).

[180]*Id.* §§ 23-1-44-1 to -20.

[181]*See, e.g.*, Cressy v. Shannon Continental Corp., 177 Ind. App. 224, 378 N.E.2d 941 (1978); Hartong v. Architects Hartong/Odle/Burke, Inc., 157 Ind. App. 546, 301 N.E.2d 240 (1973).

[182]*See, e.g.*, R. CLARK, *supra* note 4. It can be argued that the lost expectations of the minority shareholder may be worth an increased appraisal value.

[183]The party seeking an injunction must always demonstrate that the proposed action will cause irreparable harm. *See, e.g.*, Lambert v. State, 468 N.E.2d 1384 (Ind. Ct. App. 1984); Koss v. Continental Oil Co., 222 Ind. 224, 52 N.E.2d 614 (1944).

[184]*See* Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065, 1071-72 (1979).

complete, practical and efficient as equity could afford."[185] This shareholder stands to lose not only a percentage of capital investment, but also his human investment. The court will find it difficult to value this lost human interest. A fundamental rule for holding the legal remedy inadequate is the difficulty of measuring damages.[186] The new statute will make it possible to more equitably value the *shares* of the corporation,[187] but it will still be extremely difficult to value the lost expectations of an owner/employee. A court should therefore issue an injunction in situations where the shareholder of a closely held corporation risks losing both investment in financial and human capital, particularly when the risk arises from a breach of managerial duty.

B. Exclusivity Viewed Under a "Wealth Maximization" Theory

A plaintiff who is viewed as a passive investor in a corporation will face different considerations. Under an economic theory, this passive investor will be viewed as one who owns a claim of "liability" against the corporation, rather than one who actually owns "property."[188] Initially, it should be recognized that a court which operates out of a "wealth maximization"[189] analysis of law and economics will not always strictly construe a statute.[190] A court which views the investor's expectations under an economic analysis will look past a claim of "intrinsic value of ownership" and focus more upon the concept of a share being a mere "claim of liability." This focus would cause the court to conclude that a damage award would be sufficient. If the court reaches such a conclusion, the plaintiff could only request that equity be done in valuation of the shares. Because equitable considerations are specifically incorporated into the valuation provision of the new statute,[191] it would be very difficult for this plaintiff to gain an injunction.

If a director of a corporation has breached a fiduciary duty while encouraging a "freeze-out" of minority interests, then a purely economic analysis must be employed to determine whether this was an efficient violation of the law.[192] The breach is efficient if the corporation profits more than it must pay in damages to the minority. Proponents of an economic analysis contend that injunctions should only be issued where

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[185]Terrace v. Thompson, 263 U.S. 197, 214 (1923).

[186]*See* D. LAYCOCK, *supra* note 167, at 345.

[187]*See supra* notes 96-148 and accompanying text.

[188]*See supra* notes 160-61 and accompanying text.

[189]*See generally* R. POSNER, *supra* note 94.

[190]*Statutes' Domains*, *supra* note 158, at 546 (strict construction is most applicable to social welfare legislation); *cf.* R. POSNER, THE FEDERAL COURTS 261-93 (1985).

[191]IND. CODE § 23-1-44-3 (1988).

[192]*See* D. LAYCOCK, *supra* note 167, at 16.

the costs of voluntary negotiations are low.[193] This encourages settlement between the parties. However, where such transaction costs are high, the victims should be relegated to their damage remedy.[194] This prevents a total stalemate and the concomitant damage to the corporation. One situation with high transaction costs would be where there are so many dissenters that the corporation could not possibly negotiate with each one individually.[195] Another scenario of high transaction costs is a bilateral monopoly. A bilateral monopoly occurs when no third parties exist with whom the litigants can negotiate.[196] This forces the parties to deal solely with each other. Such a situation often occurs in the context of a closely held corporation, where there is no real market for a dissenter's shares. In either of these situations, if the breach is shown to be efficient, an injunction should be denied and the passive investor should collect only damages.

The underlying corporate act, which is the subject of a properly denied injunction, should be an act from which this plaintiff *profited* as a shareholder. Any appraisal proceeding is one which seeks to remedy a situation *ex post*. Such a payment decreases the value of the majority's shares when the corporation settles a dissenter's claim. However, if all parties involved are aware of the availability of an equitable appraisal (whether by court order or by statute), then the parties can bargain for the value of this remedy *ex ante*.[197] The majority thereby effectively purchases the minority's right to an injunction.[198] If the majority is willing to pay a higher price per share in order to have appraisal as the exclusive remedy, then *all* shareholders profit from the transaction.[199] This pricing mechanism thus increases the prices for shares in companies incorporated in jurisdictions which provide an appraisal as the exclusive remedy.

Maximum efficiency is the key to an economic analysis of any corporate action. If a state's corporation statutes are looked upon as a set of standard "form" contracts used to govern a business, then a shareholder becomes bound to those contracts upon investing in the enterprise.[200] Value is increased in this situation because the parties have not had to incur the increased expense of contract negotiations. A minority shareholder gains a lower initial cost under this implied contract

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[193]*See One View of the Cathedral*, *supra* note 161, at 1124-27.

[194]*Id.*

[195]*See* R. POSNER, *supra* note 94, at 27-52.

[196]*Id.*

[197]*See Appraisal Remedy*, *supra* note 16, at 873.

[198]*Id.* at 899. *See also* R. POSNER, *supra* note 94, at 305-06.

[199]*See Appraisal Remedy*, *supra* note 16, at 873.

[200]*See* R. CLARK, *supra* note 4, at 9.

but also incurs an increased risk of loss due to possible unforeseeable changes in the enterprise. Because the shareholder knows that the dissenters' appraisal remedy is exclusive, this increased risk factor should cause him to devalue his shares *ex ante*.[201] The minority shareholder is thus not harmed by a subsequent transaction which triggers the dissenters' remedy, because he paid less value *ex ante* in contemplation of such an event.

This value-increasing theory falters, however, when one of the directors is involved in fraud or self-dealing. In such a situation, all shareholders have paid a higher premium for a share which actually carried a higher risk factor than bargained for. One alternative to dispensing with appraisal as the exclusive remedy, even in a self-dealing case, would be to offer an extra element of damages in addition to the valuation calculation. The new Indiana statute follows such an approach and allows equity to calculate damages along with the fair value.[202] A shareholder who has no true interest in "ownership" would prefer such an equitable damage award. The other alternative would be to allow an injunction when the dissenters suffer more economic harm than the corporation gains. It has been pointed out, however, that such an approach would be too burdensome and speculative, because courts cannot reasonably ascertain the effect of a certain transaction on the value of the corporation's shares.[203]

The increased valuation of shares due to managerial misconduct would be especially valuable when applied to closely held corporations. Because the new dissenters' statute is applicable *only* to closely held corporations[204] (or publicly held corporations which grant the remedy under their articles of incorporation),[205] a court should more closely scrutinize an action which is alleged to be fraudulent. The conduct of a manager of a publicly held firm is generally monitored more closely than that of a manager in a closely held firm, because risk-bearing is more separated from management in a publicly held company.[206] A manager in a closely held corporation, on the other hand, is assumed to have more to lose and, consequently, is usually given more control. If a manager of a closely held corporation breaches a fiduciary duty, then this breach of duty is less likely to be discovered before it is too late for a minority shareholder to act.

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[201] *See Appraisal Remedy*, *supra* note 16, at 899.

[202] IND. CODE § 23-1-44-3 (1988). *See supra* notes 96-111 and accompanying text.

[203] *See Appraisal Remedy*, *supra* note 16, at 901.

[204] IND. CODE § 23-1-44-8(b) (1988).

[205] *Id.* § 23-1-44-8(a)(5).

[206] *See Close Corporations*, *supra* note 92, at 278.

In *Michaels v. Michaels*,[207] the Seventh Circuit Court of Appeals found that although the standards of fraud are the same between the managers of closely and publicly held companies, the manner in which these tests are applied must be different. In *Michaels*, a minority shareholder had agreed to sell his shares to the two majority shareholders, but before the transaction was completed, the majority learned that they could sell the entire enterprise to a third party for a substantial profit.[208] Although a manager in a publicly held firm would not be forced to disclose pre-merger discussions to shareholders, the court concluded that the minority shareholder in a closely held firm *was* entitled to this information.[209]

Other courts have also held that shareholders in closely held corporations owe the minority a higher standard of care than do their counterparts in publicly held firms.[210] However, a desire for fundamental fairness in the day-to-day business activities should not undermine the basic functions of the corporation. A truly "heinous"[211] act by the majority can still be remedied by an appraisal proceeding if that is what the parties bargained for. A passive investor views his share in a corporation as a means to earn profit. Thus, an equitable valuation of shares should add a profit factor onto what such an investor receives under the dissenters' rights statute. A passive investor will devalue his shares depending upon the confidence he has in corporate management. A court proceeding is simply too cumbersome a tool to use to decide what standards the parties would have imposed had they truly bargained *ex ante*.[212] For the passive investor, if a duty has been breached, then equity should only be employed in valuation, not in the use of an injunction.

V. Conclusion

The new dissenters' right statute is a much needed modernization of the previous burdensome law. The expanded and simplified procedures

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[207]767 F.2d 1185 (7th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986).

[208]*Id.* at 1192-94.

[209]*Id.* at 1195, 1205. The Seventh Circuit Court of Appeals relied upon the holding in Greenfield v. Heublein, Inc., 575 F. Supp. 1325, *aff'd*, 742 F.2d 751 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985), wherein it was decided that merger negotiations (for publicly held firms) do not become material until the merging companies have agreed upon both price and post-merger structure.

[210]*See, e.g.*, Donahue v. Rodd Electrotype Co., 367 Mass. 578, 328 N.E.2d 505 (1975) ("selective" purchase of stock a *per se* breach of duty); *In re* Kemp & Beatley, Inc., 64 N.Y.2d 63, 473 N.E.2d 1173, 484 N.Y.S.2d 799 (1984) ("reasonable expectations" of minority shareholder are best means to determine oppressive conduct of majority); Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983) (entire history of the participants' relationship may be viewed to determine "reasonable expectations").

[211]*See supra* note 11 and accompanying text.

[212]*See Close Corporations*, *supra* note 92, at 296-301.

encourage private settlement, while the liberalized valuation and interest provisions provide greater protection and security to a dissenting shareholder. Whether or not Indiana courts will create judicial exceptions to the exclusivity rule regarding certain corporate or managerial misconduct will depend upon the dissenter's interest in the corporation. A holder of one of three shares in a small "incorporated partnership" for example, will be able to seek equity more easily than one who acts merely as a passive investor.

However, the philosophical determinations made by the court should not be allowed to overshadow these same determinations made by the legislature. Investors and business owners are both expected to be apprised of the laws governing their enterprises. By choosing to incorporate under the Indiana Business Corporation statutes, entrepreneurs have bargained to follow the statutory scheme. All parties should discount the value of their shares, *ex ante*, to increase efficiency and avoid wasteful litigation. The only situation in which an injunction should be issued is when the minority shareholder is both an "owner" and employee of the corporation, and the majority has acted in an illegal manner. In all other situations, the exclusivity requirement should be enforced.

DOUGLAS K. NORMAN

The Institutionalized Wolf: An Analysis of the Unconstitutionality of the Independent Counsel Provisions of the Ethics in Government Act of 1978

I. Introduction

In Congressional testimony in 1973, then Solicitor General Robert Bork denounced the office of special prosecutor as "an office whose sole function is to attack the executive branch throughout its tenure. It is an institutionalized wolf hanging on the flank of the elk . . . ."[1] Since the enactment of the Ethics in Government Act in 1978,[2] the wolf has pounced at least twenty-three times, requiring the Attorney General to commence a preliminary investigation each time.[3] Of these, eleven cases have resulted in the appointment of an independent counsel[4] by a special division of federal court.[5]

Several attempts have been made to kill the wolf. Independent Counsel Lawrence Walsh is currently investigating former National Security Council staff member Lt. Col. Oliver North for his role in the Iran/Contra affair. In a civil suit against Mr. Walsh in February of 1987, Mr. North claimed that the Independent Counsel law was unconstitutional and demanded an injunction against the investigation. The District Court for the District of Columbia ruled that the case was "not ripe for adjudication" and denied the injunction.[6] As a response to this suit the Attorney General, in March, issued a "parallel appointment" to Walsh in the event the court appointment provided for in the statute was held unconstitutional.[7]

Mr. North's next legal challenge came in a motion to quash a grand jury subpoena because it was issued by the allegedly unconstitutional independent counsel. The district court did not pass on the merits of the claim and found Mr. North in contempt.[8] On appeal,

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[1]*Special Prosecutor and Watergate Grand Jury Legislation, Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. 263 (1973).

[2]28 U.S.C. §§ 591-98 (1982 & Supp. IV 1986).

[3]S. Rep. No. 123, 100th Cong., 1st Sess. 2, 6-7 (1987).

[4]The name of the office was changed from "special prosecutor" to "independent counsel" in a 1983 amendment. Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983).

[5]S. Rep. No. 123, 100th Cong., 1st Sess. 7 (1987); *see infra* notes 49-50 and accompanying text.

[6]North v. Walsh, 656 F. Supp. 414 (D.D.C. 1987).

[7]Office of Independent Counsel: Iran/Contra, 28 C.F.R. §§ 600, 601 (1987).

[8]*In re* Sealed Case, 827 F.2d 776 (D.C. Cir. 1987).

the United States Court of Appeals for the District of Columbia Circuit vacated the contempt judgment and remanded to the district court for a decision on the merits.[9] The district court found that Walsh was authorized to prosecute Mr. North by virtue of the Attorney General's parallel appointment.[10] The appellate court this time affirmed the district court and specifically held that in light of the parallel appointment, Mr. North's challenge to the Ethics in Government Act was not ripe for adjudication.[11] The trial date for the Iran/Contra defendants, including Mr. North, has been continued beyond the 1988 Presidential elections in November.[12]

Former White House Deputy Chief of Staff Michael Deaver had also challenged the constitutionality of the law in a civil suit against Whitney Seymour, the Independent Counsel appointed to investigate perjury charges against Mr. Deaver. He met results similar to Mr. North's.[13] On December 16, 1987, Mr. Deaver was convicted[14] of perjury, thus claiming the rather dubious honor of being the first real victim of the independent counsel wolf.[15]

Former Presidential Assistant Lyn Nofziger also tried to postpone his trial for lobbying on behalf of Wedtech Corporation by filing a civil suit against his investigator. The scope of the Independent Counsel's jurisdiction was extended, even in the Justice Department's parallel appointment,[16] to include an investigation of Attorney General Edwin Meese.[17] Mr. Nofziger's suit was dismissed by the district court.[18] He became the wolf's second victim upon his conviction in February of 1988 for illegal lobbying.[19] Meanwhile, Attorney General Meese was cleared of any wrongdoing by the Independent Counsel.[20] Mr. Meese resigned on August 4, 1988—just two and one-half weeks after being cleared by the Independent Counsel.[21]

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[9] *Id.*

[10] *In re* Sealed Case, 666 F. Supp. 231 (D.D.C. 1987).

[11] *In re* Sealed Case, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 753 (1988).

[12] 46 CONG. Q. WEEKLY REP., Aug. 6, 1988, at 2236.

[13] Deaver v. Seymour, 656 F. Supp. 900 (D.D.C.), *aff'd* 822 F.2d 66 (D.C. Cir.), *cert. denied*, 108 S.Ct. 99 (1987).

[14] Mr. Deaver was given a three-year suspended sentence and fined $100,000. 46 CONG. Q. WEEKLY REP., Sept. 4, 1988, at 2681.

[15] 46 CONG. Q. WEEKLY REP., Feb. 13, 1988, at 323.

[16] 28 C.F.R. § 602 (1988).

[17] *Id.*

[18] 45 CONG. Q. WEEKLY REP., Oct. 24, 1987, at 2604.

[19] 46 CONG. Q. WEEKLY REP., Feb. 13, 1988, at 323.

[20] 46 CONG. Q. WEEKLY REP., July 23, 1988, at 2034.

[21] 46 CONG. Q. WEEKLY REP., Aug. 6, 1988, at 2237.

In December of 1987, Congress passed the Independent Counsel Reauthorization Act of 1987[22] in order to breathe more life into the independent counsel wolf before its life statutorily expired in January of 1988.[23] The law extends the life of the wolf for five more years and makes some changes from the prior law.[24]

In spite of this extension, the relatively little known case of Theodore Olson nearly struck the wolf a fatal blow. In 1983, the House Judiciary Committee began an investigation into the Environmental Protection Agency. During the course of the hearings, Assistant Attorney General Mr. Olson testified.[25] The committee believed that Olson and others had deliberately withheld some documents from it and requested that the Attorney General conduct a preliminary investigation pursuant to the independent counsel law.[26] Alexia Morrison, who was eventually appointed as the independent counsel, moved that the appointing court expand her jurisdiction so that she could also prosecute two other Justice Department personnel.[27] The court refused, but allowed her to continue to question them concerning matters relevant to Mr. Olson's prosecution.[28] She then subpoenaed all three to appear before a grand jury.[29] They moved to quash the subpoenas on the ground that the independent counsel law is unconstitutional.[30] The district court disagreed but was reversed by the Court of Appeals for the District of Columbia, which held, for the first time, that the independent counsel law is unconstitutional.[31] The United States Supreme Court granted certiorari, heard argument, and reversed the Court of Appeals rather quickly—its opinion was handed down June 29, 1988, the final day of the October 1987 term, thereby resuscitating the wolf.[32]

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[22]Pub. L. No. 100-191, 101 Stat. 1293 (1987) (to be codified at 28 U.S.C. §§ 591-598).

[23]28 U.S.C.A. § 599 (West Supp. 1988).

[24]The Senate narrowly defeated an amendment offered by Sen. William L. Armstrong which would have subjected members of Congress to the reach of the Independent Counsel. 45 CONG. Q. WEEKLY REP., Nov. 7, 1987, at 2751. A similar effort was made in the House by Rep. E. Clay Shaw, Jr. It too was defeated. 45 CONG. Q. WEEKLY REP., Oct. 24, 1987, at 2604.

[25]*See generally* REPORT ON INVESTIGATION OF THE ROLE OF THE DEPARTMENT OF JUSTICE IN THE WITHHOLDING OF ENVIRONMENTAL PROTECTION AGENCY DOCUMENTS FROM CONGRESS IN 1982-83, H.R. REP. No. 435, 99th Cong., 1st Sess. (1985).

[26]*In re* Olson, 818 F.2d 34 (D.C. Cir. 1987).

[27]*See infra* notes 54-57 and accompanying text.

[28]*Olson*, 818 F.2d at 34.

[29]*In re* Sealed Case, 838 F.2d 476 (D.C. Cir.), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988).

[30]*Id.*

[31]*Id.*

[32]Morrison v. Olson, 108 S. Ct. 2597 (1988).

This Note explains why the Constitution should not be understood to allow this wolf to live. It begins with a brief history of the use of special prosecutors to investigate misconduct by federal government officials. Next, it explains how the independent counsel mechanism operates, highlights its more controversial provisions, and relates some relevant changes made by the 1987 Amendments. Then, it explains why the law unconstitutionally violates the separation of powers doctrine by: invading the executive's power of prosecution; vesting the power of appointment in the courts; restricting the removal power of the Executive; and reserving oversight jurisdiction in the court and the Congress.

II. History

The first use of a special prosecutor to investigate high-ranking officers of the federal government occurred during the scandal-plagued term of President Grant in 1875. A group of moonshiners, known as the Whiskey Ring, were able to bypass the revenue laws through bribery. A Federal District Attorney brought an indictment against Orville Babcock, Grant's personal secretary, for accepting bribes. Grant responded by quickly removing the District Attorney.[33] Grant then appointed a special prosecutor to finish the investigation and trial.[34]

The famed Teapot Dome affair of the early 1920's is another example of the use of a special prosecutor. In that case, Congress had passed a bill which appropriated money to the President to enable the commencement of criminal or civil suits against anyone who had profited from the cancellation of certain oil leases. President Harding then appointed a prosecutor and his investigation culminated in the conviction of his predecessor's Secretary of the Interior, Albert Fall.[35]

In the waning years of the Truman Administration, wide-spread corruption was discovered in the handling of tax evasion cases. Truman's Attorney General, McGrath, appointed a "special assistant" to look into other possible corruption in the government. This Special Assistant, Morris, declared that he was completely unaffiliated with the Department of Justice and would even investigate the Attorney General. However, when Morris asked for McGrath's files, he was

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[33]George F. Milton, The Use of Presidential Power, 1789-1943 148-49 (1945).

[34]S. Rep. No. 170, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. Code Cong. & Admin. News 4217, 4218.

[35]United States v. Fall, 10 F.2d 648 (D.C. Cir. 1925). *See generally* Sinclair v. United States, 279 U.S. 263 (1929); McGrain v. Daugherty, 273 U.S. 135 (1927); *In re* Olson, 818 F.2d 34 (D.C. Cir. 1987).

promptly fired. Truman then fired McGrath, but did not appoint a new prosecutor to take Morris's place.[36]

Watergate finally prompted Congress to provide a mechanism for investigating government officials. Attorney General Elliot Richardson created the office of Special Prosecutor to investigate the break-in at the Democratic party national election headquarters.[37] After appointing Archibald Cox to fill the position, Nixon, along with Richardson and Deputy Attorney General William Ruckelshaus, promised the Senate that Cox would not be removed. However, when Cox sought a court order to enforce a subpoena of the President's tapes,[38] Nixon sought to fire him. On October 20, 1973, in what became known as the Saturday Night Massacre, Richardson and Ruckelshaus refused to fire Cox and resigned.[39] Solicitor General Robert Bork then became the acting Attorney General and, because he had personally given no assurances to the Senate, removed Cox as the President requested.[40] Shortly thereafter, Bork reinstated the Special Prosecutor's office and Nixon appointed Leon Jaworski to the job.[41]

This history demonstrates that the executive branch can rarely be trusted to investigate itself.[42] Consequently, Congress, in the aftermath of Watergate, institutionalized the special prosecutor in the Ethics in Government Act of 1978.[43] The real question, however,—the question not addressed by the Supreme Court—[44] remains whether the Constitution permits Congress to allow anyone but the executive to investigate and prosecute abuses within the executive branch.

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[36]*Olson*, 818 F.2d at 40-41.

[37]*See* 38 Fed. Reg. 14,688, 18,877, 21,404 (1973).

[38]United States v. Nixon, 418 U.S. 683 (1974).

[39]*Special Prosecutor, Hearings Before the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess. 237 (1973) (testimony of Elliot Richardson).

[40]*Id.* at 157 (statement of Robert Bork, Acting Attorney General). In this statement, issued at a press conference four days after the "Massacre," Bork defended his actions on the ground that he felt the President's decision to get rid of Cox was "final and irrevocable," and "that the President has the right to discharge any member of the Executive Branch he chooses to discharge." *Id.* He also felt that his actions would head off mass departures from the Justice Department, thus confining the carnage to the two top people in the Department.

[41]38 Fed. Reg. 30,738, 32,805 (1973). *See also Special Prosecutor and Watergate Grand Jury Legislation, Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 251 (1973) (testimony of Robert Bork).

[42]"That the President grossly abuses the power of removal is manifest, but it is the evil genius of Democracy to be the sport of factions." Myers v. United States, 272 U.S. 52, 149 (1926) (quoting 1 PRIVATE CORRESPONDENCE OF DANIEL WEBSTER 486 (F. Webster ed. 1903)).

[43]*See supra* notes 1-2 and accompanying text.

[44]Morrison v. Olson, 108 S. Ct. 2597, 2619 (1988).

III. The Operation of the Independent Counsel Provisions

The process of the independent counsel mechanism begins when "the Attorney General receives information sufficient to constitute grounds to investigate" that the President, Vice-President, member of cabinet, high-level executive officer, high-level Justice Department official, Director or Deputy Director of the CIA, Commissioner of the Internal Revenue, or the President's campaign chairman or treasurer has engaged in activity violating federal criminal law greater than a Class B misdemeanor.[45] A 1983 amendment included in this list anyone with whom the Attorney General or other officer of the Department of Justice may have a "personal, financial, or political conflict of interest."[46]

Once the Attorney General receives sufficient information,[47] he or she must begin a preliminary investigation, without the authority to "convene grand juries, plea bargain, grant immunity, or issue subpoenas."[48] If, after ninety days, the Attorney General finds no grounds for further investigation, he or she notifies a special division of court which is composed of three judges appointed by the Chief Justice of the United States Supreme Court for a two year term on the division.[49] The special division cannot then appoint an independent counsel.[50] If, on the other hand, the Attorney General decides that sufficient grounds exist to further investigate or prosecute, or if the ninety days expires without a determination not to pursue the matter, the Attorney General must apply to the court for the appointment of an independent counsel.[51]

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[45]28 U.S.C.A. § 591(a)-(b) (West Supp. 1988).

[46]*Id.* § 591(c). Because Oliver North did not hold an office specifically named in the Act, his apparent political conflict of interest with Attorney General Meese and the Reagan Administration was the sole ground for his falling under the Act. Without § 591(c), he could not have been investigated by an Independent Counsel. *In re* Olson, 818 F.2d 34, 42 (D.C. Cir. 1987).

[47]The code requires "information sufficient to constitute grounds to investigate that any of the persons described . . . has committed a violation of any Federal criminal law other than a violation constituting a Class B or C misdemeanor or an infraction." 28 U.S.C.A. § 591(a) (West Supp. 1988).

[48]28 U.S.C. § 592(a)(1)-(2) (1982). The Department of Justice has engaged in a practice of holding lengthy "threshold inquiries" to determine if a preliminary investigation is warranted. The Independent Counsel Reauthorization Act of 1987 limits such an inquiry to fifteen days and requires the Attorney General to report to the House or Senate Judiciary Committee whether a preliminary investigation is being conducted and whether he has applied to the special division for appointment of an independent counsel. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987) (to be codified at 28 U.S.C. § 595 (b)).

[49]28 U.S.C. §§ 49, 592 (1982).

[50]28 U.S.C. § 592(b) (1982).

[51]*Id.* § 592(c).

The Attorney General's decision is not reviewable by any court.[52]

The recent case of *In re Olson*,[53] provides a good example of this process and the conclusiveness of the Attorney General's decision under the present law. In that case, the Attorney General conducted a preliminary investigation of two Assistant Attorney Generals, Olson and Dinkins, and a Deputy Attorney General, Schmults, regarding their role in withholding documents from two congressional committees investigating the EPA "Superfund" caper. The Attorney General thereafter applied to the special division for the appointment of an independent counsel to investigate Olson's actions but determined that further investigation of Dinkins and Schmults was unwarranted.[54] The counsel appointed to Olson's case, Alexia Morrison, later petitioned the special division to refer the investigation of Dinkins and Schmults to her, pursuant to the statute,[55] arguing that it was necessary for a proper investigation of Olson. The special division refused to do so because the Attorney General's determination that further investigation was unwarranted made the special division powerless to appoint an independent counsel. To refer their case to an existing counsel would destroy the effect of the Attorney General's determination.[56] As a response to *Olson*, the current Senate bill seeks to limit this discretion of the Attorney General by directing him "to give great weight to the recommendations" of the independent counsel for referrals.[57]

As a further limit on the Department of Justice, it may not investigate any matter which is the subject of an independent counsel investigation.[58] It must suspend any investigations that may have begun before the appointment of the independent counsel and turn over all relevant information on the matter of the investigation to the independent counsel.[59]

Following the Attorney General's application to the special division of court, the special division then appoints an independent counsel and defines his or her jurisdiction based upon the facts stated in the application.[60] The independent counsel then has the powers, within his

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[52]*Id.* § 592(f). A triad of Circuit Court decisions has upheld the non-reviewability of the Attorney General's decision. *See* Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986); Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984); Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984).

[53]818 F.2d 34 (D.C. Cir. 1987).

[54]*Id.* at 36.

[55]28 U.S.C. § 594(e) (1982).

[56]*Olson*, 818 F.2d at 48.

[57]S. REP. No. 123, 100th Cong., 1st Sess. 24 (1987).

[58]28 U.S.C. § 597(a) (1982).

[59]*Id.*

[60]*Id.* § 593.

or her jurisdiction, that any other United States Attorney has.[61] In addition, the independent counsel is required to report to Congress and to the special division of court on his or her progress and the reasons for not prosecuting any matter within his or her jurisdiction.[62]

Congress has also retained oversight jurisdiction by requiring that the independent counsel "shall have the duty to cooperate with the exercise of such oversight jurisdiction."[63] Congress may also request, through the Judiciary Committees, that the Attorney General apply to the special division for appointment of an independent counsel.[64] The Attorney General must, in turn, either apply for the independent counsel or explain to the Committees in writing his reasons for refusing to do so.[65]

Once the independent counsel begins an investigation, he or she is basically immune from removal. The independent counsel may be removed "only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."[66] The Attorney General must report to the special division and to Congressional Judiciary Committees specifying the grounds for any removal.[67] If removed, the independent counsel could have commenced a civil action before the special division to obtain a review of the Attorney General's decision.[68] However, the Independent Counsel Reauthorization Act of 1987 has changed this provision and now allows the independent counsel to seek review in the United States District Court for the District of Columbia and specifically forbids a member of the special division from hearing such

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[61] *Id.* § 594. *See also* S. REP. No. 170, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4217, 4222.

[62] 28 U.S.C. § 595(b)(1)-(2) (1982). The Independent Counsel Reauthorization Act of 1987 requires only one report at the termination of the independent counsel's office in addition to an expense report every six months. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987) (to be codified at 28 U.S.C. § 594(h)). The Senate would have required regular progress reports of the independent counsel every two months. S. REP. No. 123, 100th Cong., 1st Sess. 25 (1987).

[63] 28 U.S.C.A. § 595(a)(1) (West Supp. 1988) (originally 28 U.S.C. § 595(d)).

[64] *Id.* § 592(g) (originally 28 U.S.C. § 595(e)). In *In re Olson*, 818 F.2d 34 (D.C. Cir. 1987), the initial information received by the Attorney General was a 3,000 page Committee Report accompanied by a letter from its Chairman as an "official request" to conduct the investigation. 818 F.2d at 54-57. *See supra* notes 46-49 and accompanying text.

[65] 28 U.S.C.A. § 592(g) (West Supp. 1988) (originally 28 U.S.C. § 595(e)).

[66] 28 U.S.C. § 596(a)(1) (1982 & Supp. IV 1986).

[67] *Id.* § 596(a)(2).

[68] *Id.* § 596(a)(3).

a case or an appeal in such a case.[69] Otherwise, the independent counsel's office ends when either the independent counsel or the special division determines that the investigation is complete and all prosecutions are finished or may properly be finished by the Department of Justice.[70]

Thus, the independent counsel provisions of the Ethics in Government Act are designed to remove all of the normal prosecutorial powers from the executive branch when it appears that one of its members or someone with whom the branch has a conflict of interest has committed some unsavory act. Part of that power is then placed in a court of law and another part is left to the Congress.

IV. Separation of Powers

The United States Supreme Court in the 1880 case of *Kilbourn v. Thompson*,[71] explained the separation of powers doctrine in these terms:

> It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government . . . are divided into three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.[72]

In *Kilbourn*, the doctrine was invoked to invalidate a contempt of Congress order issued from a committee investigating a bankrupt real estate partnership. The Court characterized the investigation as essentially judicial in nature and, therefore, "in excess of the power conferred on that body by the Constitution."[73]

More recently, the Court declared portions of the Graham-Rudman-Hollings Balanced Budget Act unconstitutional on separation of powers

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[69]Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987) (to be codified at 28 U.S.C. § 596(3)).

[70]28 U.S.C. § 596(b) (1982).

[71]103 U.S. 168 (1880).

[72]*Id.* at 190-91.

[73]*Id.* at 196. *See also* McGrain v. Daugherty, 273 U.S. 135 (1927).

grounds.[74] The Act purported to give the Comptroller General certain executive powers which the Court determined could not be exercised by that office because it is an office within the legislative branch.[75]

The Framers of the Constitution never intended that this separation be absolute,[76] however, and the courts have taken on the duty to draw the lines which separate the powers. "[T]he reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they are not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires."[77] The Court has, in recent times, viewed its power more expansively as typified by Justice Holmes: "[W]e do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments."[78]

The Constitution, therefore, allows some flow of power between the non-"watertight compartments" of the federal government. The independent counsel law has increased the flow of power from the executive compartment to the legislative and judicial compartments. Whether the law lets too much of the constitutional powers pass through is the question.

A. Prosecution: At the Core of the Executive Power

Dean Roger Cramton argued before the House Committee on the Judiciary in 1973 that "[e]ach of the three branches of the Government has a central core of functions upon which the other branches may not unduly encroach. . . . [T]he basic tasks of one branch cannot be removed from it and placed in either another branch or an independent

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[74]Bowsher v. Synar, 478 U.S. 714 (1986).

[75]The President appoints the Comptroller General to a fifteen year term, from a list of three individuals submitted to him from the Speaker of the House and the President Pro Tempore of the Senate. He may only be removed from that office by a joint resolution of Congress or by impeachment. 31 U.S.C. § 703 (1982).

[76]"[W]here the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." THE FEDERALIST PAPERS No. 47, at 247 (J. Madison) (Max Beloff ed. 1948) (emphasis in original).

[77]Myers v. United States, 272 U.S. 52, 116 (1926). *Accord* Springer v. Philippine Islands, 277 U.S. 189 (1928); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.").

[78]Springer v. Philippine Islands, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting). *Accord* Buckley v. Valeo, 424 U.S. 1, 121 (1976); United States v. Solomon, 216 F. Supp. 835, 840 (S.D.N.Y. 1963).

agency."[79] One of the core functions of the executive branch is prosecution. The Constitution states that the President "shall take care that the Laws be faithfully executed."[80] Therefore, an attempt to take any prosecutorial power from the hands of the executive must be carefully scrutinized.

As an indication that the prosecuting function belongs solely to the executive, the courts have continually refused to become involved in the prosecutor's decisions concerning a case.[81] In 1868, a statute provided for the condemnation of property used against the United States during the Civil War. The statute also provided that anyone could file an information with the district attorney and any proceeding instituted by the district attorney, pursuant to such information, would be for the benefit of both the United States and the informer in equal parts.[82] An informer used this statute in an attempt to compel the district attorney to commence a condemnation proceeding against some property. The Court refused to make such an order, holding: "Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney."[83] Thus, even though the informer would have a property right in the property if it were condemned, he had no interest sufficient to force the district attorney to begin the proceeding.

The courts have normally denied standing to a plaintiff who sues to force a prosecutor to commence a prosecution. In *Linda R. S. v. Richard D.*,[84] it was held that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[85] In that case, a mother of an illegitimate child brought a class action suit seeking to force the district attorney to prosecute the fathers of such children under a Texas statute that declared it a misdemeanor not to support one's minor children. The Texas courts had construed the statute to apply only to legitimate children; thus, the district attorneys would not prosecute the fathers of illegitimate children.[86] The Supreme Court held that the plaintiff "must allege some threatened

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[79]*Special Prosecutor and Watergate Grand Jury Legislation, Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 339 (1973) (testimony of Roger Cramton, Dean of the Cornell Law School). *Cf.* Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

[80]U.S. CONST. art. II, § 3.

[81]*See* United States v. Nixon, 418 U.S. 683, 693 (1974).

[82]Confiscation Cases, 74 U.S. (7 Wall.) 454, 455 (1869).

[83]*Id.* at 457.

[84]410 U.S. 614 (1973).

[85]*Linda R. S.*, 410 U.S. at 619. *Accord* Leeke v. Timmerman, 454 U.S. 83 (1981).

[86]*Linda R. S.*, 410 U.S. at 615.

or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction."[87] Many other courts have reached the same result; without a showing of injury, the judiciary will not cross the separation of powers line and compel the executive to prosecute.[88]

Occasionally defendants will attack the authority of a prosecuting attorney to bring charges against them.[89] In the 1920 case of *United States v. Thompson*,[90] a district attorney proposed a forty-seven count indictment to a grand jury, which returned an indictment on just seventeen of the counts. A special Assistant Attorney General was then appointed to aid in the case. The two prosecutors then brought an indictment before another grand jury containing the same thirty counts that the previous grand jury rejected. This time the grand jury returned an indictment on those thirty counts and the defendant's motion to quash the second indictment was granted.[91] The Supreme Court reversed on the ground that granting the motion effectively "bar[red] the *absolute* right of the United States to prosecute by subjecting the exercise of that right . . . to a limitation resulting from the exercise of the judicial power."[92] Thus, a judicial power may not be exercised in a manner

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[87]*Id.* at 617.

[88]*See* Leeke v. Timmerman, 454 U.S. 83 (1981) (a prison inmate petitioned the magistrate to arrest a guard for excess brutality in putting down a prison revolt; the State Solicitor petitioned him not to do so, and he did not do so); Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986) (a member of Congress sued to compel the Attorney General to investigate violations of the Neutrality Act by the President relating to certain activities in Nicaragua); Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984) (citizens sued to force the Attorney General to begin a preliminary investigation of a Ku Klux Klan attack on civil rights marchers in Greensboro, North Carolina); Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984) (plaintiff sought to compel the Attorney General to investigate certain allegations of wrongdoing during the 1980 Presidential election; as with the two previous cases, the plaintiff here wanted to invoke the independent counsel mechanism); Peek v. Mitchell, 419 F.2d 575 (6th Cir. 1970) (plaintiff sued to have United States Attorney prosecute alleged civil rights violations and to enjoin the Detroit Police Department from its previous method of handling civil rights investigations); Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966) (plaintiff sued to compel the Attorney General to force a prosecution for an alleged conspiracy that the Attorney General refused to prosecute).

[89]*See, e.g.*, Ball v. United States, 470 U.S. 856 (1985) (prosecutor has discretion to prosecute under one of two different statutes proscribing the same activity but providing different sentences); United States v. Batchelder, 442 U.S. 114 (1979) (this case dealt with the same statutes as *Ball*); Bordenkircher v. Hayes, 434 U.S. 357 (1978) (the court is powerless to enjoin the prosecutor from reindicting the defendant on a more serious recidivist statute); Ponzi v. Fessenden, 258 U.S. 254 (1922) (the Attorney General has absolute authority to turn a federal prisoner over to a state for trial there).

[90]251 U.S. 407 (1920).

[91]*Id.* at 409-10.

[92]*Id.* at 412 (emphasis added).

that in some way limits the prosecutorial function of the executive branch.

In a few rare instances, the courts have attempted to direct the hand of a prosecutor. In *United States v. Cox*,[93] a United States Attorney refused to sign an indictment requested by a grand jury. The district court judge ordered him to sign it; the United States Attorney refused and was adjudged in contempt.[94] The Court of Appeals for the Fifth Circuit reversed the contempt order, noting that, "[i]t follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."[95]

In a similar case, *United States v. Shaw*,[96] a prosecutor reduced a charge of assault with a deadly weapon to simple assault and then requested a continuance because the complaining witness was still in the hospital.[97] The trial court objected to this change in the charge, refused the continuance, and dismissed the case for lack of prosecution.[98] In reversing the dismissal, the District of Columbia Court of Appeals admonished the trial court to "remember that the District Attorney's office is not a branch of the court, subject to the court's supervision. It is a part of the executive department."[99]

The one notable exception to the general rule that all prosecutions are in the hands of the executive branch is that a court may appoint its own attorney to conduct a criminal contempt charge.[100] In the recent case of *Young v. United States ex rel. Vuitton et Fils S. A.*,[101] Young and others had violated a permanent injunction against them relating to the infringement of a patent owned by the French firm, Vuitton et Fils. The district court appointed Vuitton's attorney to prosecute the contempt charge. Although the Supreme Court upheld the lower court's "inherent authority to initiate contempt proceedings for disobedience to . . . [its] orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt,"[102] it reversed the conviction because the court appointed "as prosecutors counsel for

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[93]342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

[94]*Id.* at 170.

[95]*Id.* at 171.

[96]226 A.2d 366 (D.C. Ct. App. 1967).

[97]*Id.* at 367.

[98]*Id.*

[99]*Id.* at 368.

[100]*See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821).

[101]107 S. Ct. 2124 (1987).

[102]*Id.* at 2130.

an interested party in the underlying civil litigation."[103] Justice Scalia concurred in the result but would have decided the case on the ground that the court has no inherent power to prosecute even contempt cases.[104] "Rather, since the prosecution of law violators is part of the implementation of the laws, it is . . . executive power, vested by the Constitution in the President."[105]

In any event, a court's appointment of an attorney to prosecute a contempt charge is distinguishable from its appointment of an independent counsel in that the former is "essential in ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other branches."[106] The appointment of an attorney to investigate and prosecute certain officials in the executive branch, on the other hand, is not remotely essential to the proper functioning of the judiciary.

In upholding the Independent Counsel Act, the Supreme Court conceded that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that *typically* have been undertaken by officials within the Executive Branch."[107] The question for the court was not, then, whether the independent counsel exercised purely executive power; rather, it was whether that exercise was so removed from the Executive as to be unconstitutional. The Court held it was due to the Attorney General's control and supervision over the independent counsel.[108]

The Ethics in Government Act purports to create another exception to executive control of prosecution. Yet it goes even further than the contempt of court exception upheld in *Young* because it affirmatively *denies* prosecutorial power to the executive,[109] whereas the contempt exception merely *allows* the court to exercise such power in the absence of executive action.[110] Such a transfer of executive authority is not within the contemplation of the Constitution. "The executive Power shall be vested in a President of the United States,"[111] not in the Congress or the courts.

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[103]*Id.* at 2135.

[104]*Id.* at 2141-42 (Scalia, J., concurring).

[105]*Id.* at 2142.

[106]*Id.* at 2131. *But see* THE FEDERALIST PAPERS No. 78, at 396 (A. Hamilton) (M. Beloff ed. 1948) (the judiciary "must ultimately depend upon the aid of the executive arm for the efficacious exercise even of [its own judgments]").

[107]Morrison v. Olson, 108 S. Ct. 2597, 2619 (1988) (emphasis added).

[108]*Id.* at 2621; *see infra* notes 174-75 and accompanying text.

[109]*See supra* notes 58-59 and accompanying text.

[110]*See Young*, 107 S. Ct. at 2134.

[111]U.S. CONST. art. II, § 1. "[T]his does not mean *some of* the executive power,

B. Appointment: An Interpretation Problem

Congress claims that its authority to vest the appointment power of the independent counsel in the special division arises from the appointments clause of the Constitution. That clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, *in the Courts of Law*, or in the Heads of Departments.[112]

The independent counsel is probably an inferior officer because very few officers are considered superior officers; perhaps only cabinet members.[113] At first glance, it would appear that the authority to appoint any inferior officer may be exercised by the courts should Congress so provide. However, when the clause is read in light of the separation of powers doctrine, a much different scheme becomes apparent.

In the early case of *Ex parte Hennen*,[114] the district courts had been empowered to appoint their own clerks. Although the Supreme Court was primarily concerned with removal power, the Court noted that "[t]he appointing power here designated, in the latter part of the section [of the Constitution], was, no doubt, intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged."[115] Because the clerks of the court obviously belong in the judicial department, there was no problem in allowing the court to appoint them pursuant to the Congressional directive.[116]

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but *all of* the executive power." *Morrison*, 108 S. Ct. at 2626 (Scalia, J., dissenting) (emphasis in original).

[112]U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

[113]*See* Buckley v. Valeo, 424 U.S. 1, 126 (1976); United States v. Smith, 124 U.S. 525 (1888); United States v. Germaine, 99 U.S. 508 (1878); United States v. Hart, 838 F.2d 476, 73 U.S. (6 Wall.) 385 (1867). *Contra In re* Sealed Case 838 F.2d 476 (D.C. Cir. 1988) (specifically holding that due to the nature of the duties of the office, the independent counsel is not an inferior officer within the meaning of the appointments clause), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988).

[114]38 U.S. (13 Peters) 230 (1839).

[115]*Id.* at 257-58.

[116]28 U.S.C. § 751 (1982).

Later, in the 1879 case of *Ex parte Siebold*,[117] the courts were empowered to appoint federal election supervisors. The Court followed *Hennen* in so far as it was "usual and proper to vest the appointment power"[118] in the most appropriate branch. The Court added, however that "there is no absolute requirement to this effect in the Constitution."[119] The Court found that this granting of the appointment power to the district courts was not unconstitutional, even though the election officials were clearly executive branch officials. The Court held that courts may properly appoint officials whose duties are not judicial when "there is no such *incongruity* in the duty required as to excuse the courts from its performance, or to render their acts void."[120] Proponents of the independent counsel rest much of their argument on this case, especially noting that there is no "incongruity" in allowing the court to appoint a prosecutor, who is, after all, an officer of the court. Indeed, the argument goes, there is much "incongruity" in allowing a person to investigate himself or those close to him. Yet, the Court in *Siebold* did not fully explain its use of the term "incongruity" nor has the Supreme Court since then been confronted with a case where the term could be better explained.[121]

In the 1967 case of *Hobson v. Hansen*,[122] Congress' vesting of the power to appoint the members of the District of Columbia Board of Education in the District Court for the District of Columbia was challenged. The court had accepted this duty primarily because of Congress' plenary power over the District of Columbia.[123] Yet the court discussed the appointments clause and concluded that "[t]his was a deliberate decision by the Framers to enable Congress in its wisdom to authorize 'the courts of Law' to share with the executive the ap-

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[117]100 U.S. 371 (1879).

[118]*Id.* at 397.

[119]*Id.* This conclusion is based on a very superficial reading of the Constitution. Earlier in the opinion, the Court explained how it was reading the document:

> But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.

Id. at 393. There are no penumbras for this Court.

[120]*Id.* at 398 (emphasis added).

[121]In Morrison v. Olson, 108 S. Ct. 2597 (1988), the Supreme Court was afforded the opportunity to illuminate the term. Instead, it chose not to by merely stating: "we do not think it impermissible for Congress to vest the power to appoint independent counsels in a specially created federal court." *Id.* at 2611. Justice Scalia, dissenting, noted that the standard is now "the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis." *Id.* at 2630.

[122]265 F. Supp. 902 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968).

[123]*Id.* at 909. *See infra* note 134.

pointing power of federal officers."[124] However, the exceptions clause was added just one day before the end of the Constitutional Convention by Gouverneur Morris.[125] Madison made the only objection; the exception should allow, in some cases, superior officials below the department head to appoint some inferior officers. Otherwise, in his view, the exception was not necessary at all.[126] Morris responded that that was not necessary because the department head could just issue a blank commission for the other officer to fill in the name of his desired appointee.[127] The amendment, on a second vote, passed unanimously.[128] Thus, there seems to be little evidence from the Constitutional Convention itself that the Framers entertained the intent that the *Hobsen* court attributes to them. Indeed, Judge Skelly Wright, in his dissent in *Hobsen*, wrote that the exceptions clause "very naturally admits the common-sense reading that courts of law and the other listed officers were meant to appoint only those officers 'inferior' to them."[129]

In *United States v. Solomon*,[130] a New York District Court held that it could properly exercise the power to appoint United States Attorneys when an unexpected vacancy in that office occurs as defined by statute.[131] The court noted, however, that this authority "in no wise equates to the *normal* appointive power. First, the judiciary's power is only of a temporary nature. . . . Second, the exercise of the appointive power by the judiciary in no wise binds the executive."[132] And third, the court was given no power of removal.[133] Yet, the judiciary's ap-

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[124]265 F. Supp. at 911.

[125]DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. No. 398, 69th Cong., 1st Sess. 733 (1927) . *See also Special Prosecutor and Watergate Grand Jury Legislation, Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. 263 (1973) (Memorandum prepared by Richard Ehlke, legislative attorney, American Law Division, Library of Congress).

[126]DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. No. 398, 69th Cong., 1st Sess. 733 (1927).

[127]*Id.*

[128]*Id.*

[129]Hobson v. Hansen, 265 F. Supp. 902, 921 (D. D.C. 1967) (Wright, J., dissenting), *appeal dismissed*, 393 U.S. 801 (1968).

[130]216 F. Supp. 835 (S.D.N.Y. 1963).

[131]28 U.S.C. § 546 (1982).

[132]*Solomon*, 216 F. Supp. at 842 (emphasis added). *Accord In re* Farrow, 3 F. 112, 116 (C.C.N.D. Ga. 1880) ("It was not to enable the circuit justice to oust the power of the president to appoint, but to authorize him to fill the vacancy until the president should act, and no longer.").

[133]*Solomon*, 216 F. Supp. at 842. *See also* United States v. Eaton, 169 U.S. 331, 343 (1898) ("Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official.").

pointive power over the independent counsel is the "normal" appointive power. The court's appointee is not a temporary appointee; he or she acts until the particular case is completed. The court's appointment is also binding on the executive because the Department of Justice cannot commence a parallel investigation[134] and the executive cannot remove the appointee except for good cause.[135]

One method of construing the appointments clause is to determine what appointments Congress has traditionally given the courts. As Justice Frankfurter wrote, "the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."[136] More specifically, Justice Scalia wrote that whether a function is executive or not can only be determined "by reference to what has always and everywhere—if conducted by Government at all—been conducted never by the legislature, never by the courts, and always by the executive."[137] Apart from the federal courts of the District of Columbia,[138] there have been only two circumstances in which Congress has vested the courts with the power to appoint non-judicial officers:[139] first, the election supervisors as in *Siebold*, which authority was repealed in 1894;[140] and second, the temporary United States Attorney as in *Solomon*, which authority was severely limited in 1986 when Congress provided that the Attorney General is to appoint a temporary United States Attorney in the event of a vacancy and the court may only make a temporary appointment if the President does not replace or affirm the Attorney General's appointee after 120 days.[141]

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[134]*See supra* notes 58-59 and accompanying text.

[135]*See supra* notes 66-70 and accompanying text.

[136]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952). *Accord* United States v. Midwest Oil Co., 236 U.S. 459, 472-73 (1915).

[137]Morrison v. Olson, 108 S. Ct. 2597, 2626 (1988) (Scalia, J., dissenting).

[138]Because of Congress' plenary power over the District, it may vest those courts with powers, relating to the District, which it could not give to other federal courts. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); District of Columbia v. Carter, 409 U.S. 418 (1973); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949); Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923); Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968).

[139]Some examples of judicial officers appointed by the courts are clerks, 28 U.S.C. § 751 (1982), and commissioners, 28 U.S.C. § 631 (1982). Attorneys appointed to prosecute contempt cases are likewise judicial officers because the courts authority to appoint them is inherent; not by congressional grant. *See* Young v. United States *ex rel.* Vuitton et Fils S. A., 107 S. Ct. 2124 (1987).

[140]Act of February 8, 1894, ch. 25, 28 Stat. 36.

[141]28 U.S.C. § 546 (1982).

In passing the 1987 amendments to the independent counsel law,[142] Congress may have unwittingly made the law unconstitutional by depriving the special division of its "court of Law" status. Prior to 1987, the special division had jurisdiction to hear one type of "Case or Controversy":[143] a review of the Attorney General's decision to remove an independent counsel.[144] This jurisdiction made the special division an Article III court which could then appoint certain officers pursuant to the appointments clause.[145] Yet the 1987 amendments did away with this jurisdiction of the special division, moving the review of the removal decision to the United States District Court for the District of Columbia.[146] There is no indication that any of the members of Congress realized the effect of removing the jurisdiction;[147] however, in so doing, Congress has made the special division constitutionally unable to appoint any federal officers because it is no longer a "court of Law" within the meaning of the appointments clause.

The mode by which Congress has sought to vest the appointment power of the independent counsel is unique in that it has never consistently granted the courts such a power over executive officials. It is also a violation of the separation of powers doctrine as determined by both case law and the tradition of not vesting such a power in the courts throughout the history of the government.

C. Removal: The President's Prerogative

Normally the President may "remove an officer when in his discretion he regards it for the public good."[148] This conclusion was the result of the interpretation of the Constitution by the first Congress in 1789. A provision of the original bill to establish the Department

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[142]Independent Counsel Reauthorization Act of 1987, 101 Stat. 1293, 1305 (to be codified as 28 U.S.C. § 596(a)(3)).

[143]The Constitution extends the judicial power to certain types of "cases" and "controversies." U.S. CONST. art. III, § 2, cl.2.

[144]28 U.S.C. § 596(a)(3) (1982).

[145]*See* Simon, *The Constitutionality of the Special Prosecutor Law*, 16 U. MICH. J.L. REF. 45, 68 (Fall 1982).

[146]Independent Counsel Reauthorization Act of 1987, 101 Stat. 1293, 1305 (to be codified as 28 U.S.C. § 596(a)(3)).

[147]*See, e.g.*, H.R. REP. No. 316, 100th Cong., 1st Sess. 33-34 (1987) (The House Judiciary Committee made the change to the district court "because this is a trial court accustomed to determining issues of fact. . . . [I]t was inappropriate for the appointing authority to also sit in judgment of a dispute over removal."). *See also* S. REP. No. 123, 100th Cong., 1st Sess., *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 2150; H.R. CONF. REP. No. 452, 100th Cong., 1st Sess., *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 2185.

[148]Parsons v. United States, 167 U.S. 324, 343 (1897).

of Foreign Affairs allowed the President to remove the Secretary of State at will. Several Congressmen, including Madison, objected to the provision because it sounded like a grant of the removal power to the executive, and they felt that the removal power was inherent to the office of the Executive. The Madison faction eventually prevailed and the clause was stricken from the law.[149] This "decision of 1789," as it came to be known, established that "the power to remove officers appointed by the President and the Senate vested in the President alone."[150]

This congressional construction of the Constitution was affirmed in the 1926 case of *Myers v. United States*.[151] In that case, a postmaster first class was removed from office by the action of the President before the postmaster's term had expired. The statute provided that the postmasters were to be appointed *and removed* by the President with the advice and consent of the Senate. Chief Justice Taft writing for the majority, held that "the Court never has held, nor reasonably could hold, . . . that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power."[152] In the opinion, Chief Justice Taft emphasized that the President must be at liberty to surround himself with competent, loyal officers to do his bidding and permit him to discharge his constitutional duty to execute the laws.[153] Thus, the power of removal of all officers is a constitutional prerogative of the President and cannot be subject to limitation by Congress.[154]

Myers was limited less than ten years later by *Humphrey's Executor v. United States*.[155] In that case, Humphrey, a member of the Federal Trade Commission, was removed from his office by President Roosevelt after only two years in the position. The statute which created the FTC[156] provided for seven-year terms for the commissioners and that they "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."[157] The Court found that the statute

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[149]*See* Myers v. United States, 272 U.S. 52, 114-26 (1926); *Parsons*, 167 U.S. at 328-30.

[150]*Myers*, 272 U.S. at 114.

[151]272 U.S. 52 (1926).

[152]*Id.* at 161.

[153]*Id.* at 133-34.

[154]*Id.* at 134. *Accord* Shurtleff v. United States, 189 U.S. 311, 312-13 (1903) (a customs official was removed by the President without cause notwithstanding a statute which provided that he may be removed only for "inefficiency, neglect of duty, or malfeasance in office").

[155]295 U.S. 602 (1935).

[156]15 U.S.C. § 41 (1982).

[157]*Id.*

was designed to limit the power of the President so that the commissioners could operate fairly free from executive control for the entire seven-year term.[158] The Court held that this limitation was not an unconstitutional interference with the executive branch because the duties of the FTC were "neither political nor executive, but predominantly quasi-judicial and quasi-legislative."[159] The FTC acts in its legislative character "[i]n making investigations and reports thereon for the information of Congress."[160] It acts in its judicial character when it assumes the role of "master in chancery."[161] The Court noted that "such a body cannot in any proper sense be characterized as an arm or an eye of the executive."[162]

This principle was taken even further by the Supreme Court in *Wiener v. United States*.[163] In that case, a member of the War Claims Commission was removed before his term expired. The War Claims Commission was established by Congress[164] to adjudicate claims for compensating those "who suffered personal injury or property damage at the hands of the enemy in connection with World War II."[165] The Commission was to finish its duties no later than three years after the time for filing claims and the commissioners' tenure would last until that time. There was no provision as to removal of the commissioners.[166] Justice Frankfurter, writing for the court, discussed *Humphrey's Executor* saying, "[i]t drew a sharp line of cleavage between officials who were part of the Executive establishment,"[167] removable at will by the President, and those officials with some degree of independence from the executive, such as members of the FTC, "as to whom a power of removal exists only if Congress may fairly be said to have conferred it."[168] Frankfurter reasoned that the War Claims Commission was intended to be free of executive interference and thus, even though Congress was silent about removal, the executive was powerless to remove a commissioner.[169] It should be noted, however, that the com-

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[158]*Humphrey's Executor*, 295 U.S. at 625-26. In Shurtleff v. United States, 189 U.S. 311, 314, 318-19 (1903), the Court upheld the removal of the customs official on grounds that he was presumed removed for reasons other than those enumerated in the statute.

[159]*Humphrey's Executor*, 295 U.S. at 624.

[160]*Id.* at 628

[161]*Id. See also* 15 U.S.C. § 47 (1982).

[162]*Humphrey's Executor*, 295 U.S. at 628.

[163]357 U.S. 349 (1958).

[164]War Claims Act of 1948, 62 Stat. 1240.

[165]*Wiener*, 357 U.S. at 350.

[166]*Id.* at 352.

[167]*Id.* at 353.

[168]*Id.*

[169]*Id.* at 356.

missioner's duties were clearly "quasi-judicial" in character. Thus, *Myers* is still good law where the officer involved does not perform "quasi-legislative" or "quasi-judicial" duties, i.e., an officer whose duties are purely executive, and the President may not be limited in his right to remove such an officer.[170]

An independent counsel is a purely executive officer, as is any United States Attorney, because his or her function is the exclusive executive function of prosecution. "[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."[171] The attorney is also an officer of the court,[172] but this does not remove him from the "purely executive" category. As then Judge Warren Burger wrote:

> An attorney for the United States, as any other attorney, however, appears in a dual role. He is at once an officer of the court and the agent and attorney for a client; in the first capacity he is responsible to the court for the manner of the conduct of a case, *i.e.*, his demeanor, deportment and ethical conduct; but in his second capacity, as agent and attorney for the Executive, he is responsible to his principal and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duty within the framework of his professional employment.[173]

In *Morrison v. Olson*,[174] the Supreme Court did not suggest that the independent counsel was anything but a purely executive official.[175] The Court held, however, that the removal power restriction does not "turn on whether or not that official is classified as 'purely executive.' "[176] The Court had admittedly, deviated from the *Myers*, *Hum-*

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[170]Justice White, dissenting, in Bowsher v. Synar, 478 U.S. 714, 761 n.3 (1986), argued that "although the court in *Humphrey's Executor* found the use of the labels 'quasi-legislative' and 'quasi-judicial' helpful in 'distinguishing' its then-recent decision in [*Myers*], these terms are hardly of any use in limiting the holding of the case." However, that is exactly what the *Humphrey's Executor* court did and said it was doing.

[171]United States v. Nixon, 418 U.S. 683, 693 (1974); *accord* Nathan v. Smith, 737 F.2d 1069, 1079 (D.C. Cir. 1984) (Bork, J., concurring) ("the principle of Executive control extends to all phases of the prosecutorial process").

[172]This dual role of both federal and state prosecuting attorneys is the basis for the absolute immunity they enjoy from civil suits for malicious prosecutions and § 1983 claims. Imbler v. Pachtman, 424 U.S. 409 (1976). *See also* Cleavinger v. Saxner, 474 U.S. 193 (1985); Butz v. Economou, 438 U.S. 478, 511-12 (1978); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

[173]Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967).

[174]108 S. Ct. 2597 (1988).

[175]*Id.* at 2619; *see also supra* note 107 and accompanying text.

[176]*Morrison*, 108 S. Ct. at 2618.

phrey's Executor, and *Wiener* line of cases which specifically relied on the classification of officers to determine whether Congress may restrict the Executive's removal power.

Under the rule that "the power of removal is incident to the power of appointment,"[177] the court would have been the recipient of the power to remove the independent counsel. However, Congress felt that giving the court that power as well would strain the separation of powers doctrine too much,[178] so a limited power of removal was given to the Attorney General.[179] In *United States v. Perkins*,[180] the Secretary of the Navy removed a cadet-engineer without a court martial nor a showing of misconduct required by statute. In reinstating the cadet, the Supreme Court noted that "[t]he head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto."[181] Thus, when the heads of departments are the appointing authorities, Congress may "limit and restrict the power of removal as it deems best for the public interest."[182]

The Supreme Court reasoned that the Attorney General's power to remove the independent counsel for good cause is the "most important" factor in finding that the Act does not violate the separation of powers principle.[183] The Court notes that this limited removal power gives the President "substantial ability to ensure that the laws are 'faithfully executed' by an independent counsel."[184] It merely needs to be repeated, as a rejoinder to this argument of the Court, that the *President* is to see that the laws are faithfully executed.[185] The President's role is not to be limited to overseeing a purely executive official thrust upon him by the Congress and Courts.

Justice Scalia's retort to the Court's reasoning in this regard is to remind the Court of the significance of so limiting the removal power. To assert that removal for good cause is control over the independent counsel, "is somewhat like referring to shackles as an effective means

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[177]Reagan v. United States, 182 U.S. 419, 424 (1901). *See also* Shurtleff v. United States, 189 U.S. 311 (1903); *Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 259 (1839).

[178]S. REP. No. 170, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS, 4217, 4221.

[179]28 U.S.C. § 596(a) (1982). *See supra* notes 66-70 and accompanying text.

[180]116 U.S. 483 (1886).

[181]*Id.* at 485.

[182]*Id.*

[183]Morrison v. Olson, 108 S. Ct. 2597, 2621 (1988).

[184]*Id.*

[185]U.S. CONST. art. II, § 3.

of locomotion.[186] That is to say, "limiting removal power to 'good cause' is an impediment to, not an effective grant of, presidential control."[187]

D. *Oversight: An Inappropriate Function*

1. The Court.—One of the reasons that the District Court for the District of Columbia upheld its power to appoint Board of Education members in *Hobson* was that the court was only "to appoint the members of the board, not to administer the schools."[188] The same is true for the function in *Siebold*; the court merely appointed the election supervisors, it did not supervise the election.[189] Yet, the independent counsel law provides that the court is to determine the prosecutor's jurisdiction once it makes the appointment.[190] The court can refer matters to the counsel,[191] and the counsel must report to the court his or her reasons for dropping a case, as well as the disposition of any prosecution that is brought.[192]

These powers go far beyond the simple appointment of the officer and represent not only further infringement on the executive branch, but also the performance of clearly non-judicial functions by an Article III court. At issue in one of the first cases decided by the Supreme Court of the United States, *Hayburn's Case*,[193] was an Act of Congress that had granted the circuit courts the authority to regulate the pensions of Revolutionary War veterans. The case was dismissed for lack of jurisdiction, but letters from the Justices to President Washington, reprinted in a note to the case, showed that they believed they could not constitutionally perform the duty imposed upon them by Congress. "Because the business directed by this act is not of a judicial nature. [sic] It forms no part of the power vested by the constitution in the courts of the United States. . . ."[194]

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[186]*Morrison*, 108 S. Ct. at 2627 (Scalia, J., dissenting).

[187]*Id.*

[188]Hobson v. Hansen, 265 F. Supp. 902, 913 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968).

[189]*Ex parte* Siebold, 100 U.S. 371 (1879).

[190]28 U.S.C. § 593 (1982).

[191] *Id.* § 594(e).

[192]*See supra* note 62 and accompanying text.

[193]2 U.S. (2 Dall.) 408 (1792).

[194]*Id.* at 410 n.2. It seems rather ironic that one of the first "cases" that stands for the proposition that the courts cannot give advisory opinions was itself an advisory opinion. This specific holding, however, is given a more formal setting in an unreported decision of the Supreme Court in 1794, *United States v. Yale Todd*, excerpts of which are found in a note inserted after United States v. Ferreira, 54 U.S. (13 How.) 39, 51-53 (1851).

The Court reaffirmed this principle in *Interstate Commerce Commission v. Brimson.*[195] The Interstate Commerce Act gives the I.C.C. authority to petition the district court to compel the attendance of witnesses, to issue contempt orders, and to take depositions. Because all these functions are judicial in nature, "[t]hey do not . . . infringe upon the salutary doctrine that Congress (excluding the special cases provided for in the Constitution, as, for instance, in section two of article two of that instrument) may not impose upon the courts of the United States any duties not strictly judicial."[196] It seems that the statement in *Hobson* that "[t]here is no constitutional principle that federal judges may not engage officially in nonjudicial duties"[197] is simply not true.[198]

In the 1987 case of *In re Sealed Case*,[199] the court upheld the power of the special division to define the independent counsel's jurisdiction as "a necessary and proper incident of this appointing power."[200] This argument is meritless; defining the independent counsel's jurisdiction is, in effect, defining the duties of the independent counsel. As Justice Taft wrote in *Myers*, "To Congress under its legislative power is given the establishment of offices, [and] the determination of their functions and jurisdiction . . . ."[201] Therefore, the special division is called upon to strike a division of labor between the Department of Justice and the Office of Independent Counsel. This power is clearly legislative in nature, and Congress must either retain it or delegate it to the Department of Justice.

Nevertheless, the Supreme Court in *Morrison*[202] "disagreed." Citing to no authority, the Court noted that in "certain circumstances" Con-

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[195]154 U.S. 447 (1894).

[196]*Id.* at 485. *Accord* Muskrat v. United States, 219 U.S. 346 (1910); United States v. Ferreira, 54 U.S. (13 How.) 39 (1851); *In re* Application of the President's Comm'n on Organized Crime (Subpoena of Scaduto), 763 F.2d 1191 (11th Cir. 1985). *But see* Matter of the President's Comm'n on Organized Crime (Subpoena of Scarfo), 783 F.2d 370 (3d Cir. 1986).

[197]Hobson v. Hansen, 265 F. Supp. 902, 915 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968).

[198]*See id.* at 922 (Wright, J., dissenting) ("[T]he insistent doctrine of our law, articulated by Article III and constitutional history, [is] that the federal judiciary refrain from indulging in nonjudicial activities."); *In re* Richardson, 247 N.Y. 401, 420, 160 N.E. 655, 661 (1928) (Cardozo, C.J.) ("The policy is to conserve the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties.").

[199]665 F. Supp. 56 (D. D.C. 1987), *rev'd*, 838 F.2d 476 (D.C. Cir.), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988).

[200]*Id.* at 60 n.5.

[201]Myers v. United States, 272 U.S. 52, 129 (1926).

[202]Morrison v. Olson, 108 S. Ct. 2597 (1988).

gress may "vest the power to define the scope of the office in the court as an incident to the appointment of the officer pursuant to the Appointments Clause."[203] The Court then held that because the jurisdiction of the independent counsel "must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of an independent counsel,"[204] the grant of the jurisdiction determining power to the court did not run afoul of Article III.

2. Congress.—In the Act, Congress has retained oversight power over the independent counsel and has demanded that the independent counsel obey any exercise of that power.[205] Although this power has not been exercised by Congress to date, its existence is repugnant to the Constitution. "Authority to prosecute an individual is that government power which most threatens personal liberty."[206] The Constitution protects personal liberty from the prosecutorial power through the separation of powers, forbidding Congress to exercise prosecutorial power by passing a "Bill of Attainder or ex post facto Law."[207]

When any prosecution is conducted, the prosecutor must be an officer of the executive branch; this is the meaning of the Constitution.[208] To allow the Congress to have a direct hand in any such prosecution violates the Constitution. Because "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex,"[209] the legislature can "mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."[210] The independent counsel is one of those "indirect" measures. "It is all the more necessary, therefore, that the exercise of power by this body, when acting separately from and independently of all other depositories of power, should . . . receive the most careful scrutiny."[211]

In *Morrison*, the Supreme Court did not seriously address this contention, "observing" that "this case does not involve an attempt by Congress to increase its own powers at the Expense of the Executive

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[203]*Id.* at 2612-13.

[204]*Id.* at 2613.

[205]*See supra* note 63 and accompanying text.

[206]*In re* Sealed Case, 838 F.2d 476, 487 (D.C.Cir. 1988).

[207]U. S. CONST art. I, § 9, cl. 3.

[208]*See generally* Community for Creative Non-Violence v. Pierce, 786 F.2d 1199 (D.C. Cir. 1986); United States v. Nixon, 418 U.S. 683 (1974); United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

[209]THE FEDERALIST PAPERS *No. 48*, at 253 (J. Madison) (M. Beloff ed. 1948).

[210]*Id.*

[211]Kilbourn v. Thompson, 103 U.S. 108, 192 (1880).

Branch."[212] The Court did note that the act empowers certain members of Congress to request that the Attorney General apply for an independent counsel,[213] but found this power innocuous because the Attorney General need not comply with such request.[214] The power is not innocuous, however, because of the great practical and political implications it possesses. Justice Scalia, in his dissent, made this abundently clear using Olson's case as an example of this political tool. The request to apply for the independent counsel came with a 3,000 page document following over two years of Congressional investigation.[215] "Merely the political consequences (to [Attorney General Meese] and the President) of seeming to break the law by refusing to [comply with the request] would have been substantial."[216] Justice Scalia hit the nail on the head in observing, "The context of this statute is acrid with the smell of threatened impeachment."[217]

V. Conclusion

The Tenure in Office Act of 1867 purported to require the Senate's approval before any official who was appointed by the President with the advice and consent of the Senate could be removed from office. President Johnson's refusal to comply with the Act was one reason for his near impeachment. Chief Justice Taft, in *Myers*, noted that the Act "exhibited in a clear degree the paralysis to which a partisan Senate and Congress could subject the executive arm and destroy the principle of executive responsibility and separation of powers, sought for by the framers of our Government."[218] Taft's words ring true today in regard to the Ethics in Government Act of 1978. In light of Watergate, the laudatory nature of Congress' action cannot be doubted. Congress wanted to "ensure that in the next national emergency such an office [independent counsel] would come into existence at an early stage."[219] However, this goal cannot justify ignoring the plain dictates of the Constitution.

The Ethics in Government Act has obliterated the authority of the executive branch to conduct all public prosecutions by allowing a court of law to appoint an independent counsel and define his duties in

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[212]Morrison v. Olson, 108 S. Ct. 2597, 2620 (1988).

[213]*See supra* notes 64-65 and accompanying text.

[214]*Morrison*, 108 S. Ct. at 2621.

[215]*See supra* note 64.

[216]*Morrison*, 108 S. Ct. at 2624 (Scalia, J., dissenting).

[217]*Id.* at 2625.

[218]*Myers*, 272 U.S. at 167.

[219]S. Rep. No. 170, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Admin. News, 4217, 4222.

violation of the separation of powers doctrine. The Act has purported to stay the hand of the President by limiting his power to remove a purely executive branch official. It has given Congress an unprecedented role in policing the executive branch. It is a wolf that Congress has hidden in sheep's clothing. But if its true nature is revealed, it displays the unmistakable characteristics of an unconstitutional, institutionalized wolf.[220]

ROBERT G. SOLLOWAY

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[220]Perhaps the true, wolfish nature of the independent counsel is revealed rather easily. Justice Scalia wrote in his dissent in Morrison v. Olson, 108 S. Ct. 2597, 2623 (1988) (emphasis added):

> Frequently an issue of this sort will come before the court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibruim of power is not immediately evident, and must be discerned by a careful and perceptive analysis. *But this wolf comes as a wolf.*

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